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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOEL CURRY, a minor, by and through his parents, PAUL and MELANIE CURRY,

Petitioners,

v.

IRENE HENSINGER, Principal, Handley School,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Handley School in Saginaw, Michigan conducts an annual academic exercise for its fifth-grade students to teach them about the market economy and civics. As part of that exercise, the students create a home-made product to market and sell in a faux marketplace set up in the school gym. Petitioner Joel Curry participated, and designed a candy-cane Christmas ornament to sell in his "store." He attached to that ornament a tiny booklet containing text which assigns religious significance to the characteristics of the candy cane. Respondent Principal Irene Hensinger required that Joel remove the booklet from each product for sale, as it expressed a religious viewpoint. The questions presented are:

1. Did the Sixth Circuit err by holding that a public elementary school student's religious speech presented in response to, and in compliance with, a class assignment, may be categorized as *per se* "offensive" because it is religious, and censored for that reason?

2. Did the Sixth Circuit err by holding that a student's individual speech presented in response to and in compliance with the terms of a school assignment is "reasonably perceived to bear the imprimatur of the school" because it is "part of school activities," and therefore subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)?

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INTRODUCTION

The court below ruled that censorship by school officials of assignment-compliant student speech because it presents a religious viewpoint serves the "valid educational purpose" of preventing "offense" to students and their parents. This unprecedented ruling identifies student religious speech as uniquely incompatible with a proper educational environment. The Sixth Circuit has given elementary school officials a green light to censor students' religious viewpoints from classroom discussion and other forms of presentation in the curricular context. The court's decision thereby conflicts with the relevant U.S. Department of Education guidelines binding public elementary and secondary schools across the country. And the holding below injects inconsistency into First Amendment standards by validating—in the name of the First Amendment—a speech regulation hostile to a preeminent First Amendment value.

This Court should grant review.

OPINIONS BELOW

The decision of the Sixth Circuit is reported: *Curry v. Hensiner* [sic], 513 F.3d 570 (6th Cir. 2008). It is included as Appendix A to this petition.

The decision of the Eastern District Court of Michigan is reported: *Curry v. School Dist. of the City of Saginaw*, 452 F.Supp.2d 723 (E.D. Mich. 2006). It is included as Appendix B to this petition.

The order of the Sixth Circuit Court of Appeals denying rehearing en banc is not reported. It is included as Appendix C to this petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its panel decision on January 16, 2008. Petitioners sought rehearing *en banc* on January 30, 2008, which request was denied by the court on May 13, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Appendix D. Excerpts from the U.S. Department of Education policy on student religious speech in public elementary and secondary public schools is set forth in Appendix E.

STATEMENT OF THE CASE

I. Material facts

In December of 2003, Plaintiff Joel Curry, while a fifth grade student at Handley School in Saginaw, Michigan, participated in the school's "Classroom City" event. Stip. Facts (Dkt. 15) at ¶¶ 1-3, 8. Classroom City is a hands-on economic and civics simulation intended to serve as a pedagogical tool for students on subjects ranging from marketing to government. App. 2a-3a.

As part of the 2003 Classroom City exercise, each fifth grader at the school was required to develop, market, and produce a handmade product to be later offered for "sale." Stip. Facts (Dkt. 15) at ¶ 4. During a three-day period, the fifth graders presented these products for "purchase" to other students in the school's gymnasium from 56 mock storefronts created from cardboard refrigerator boxes which the students had decorated. *Id.* at ¶¶ 4, 9.

The boundaries of permissible products the students were to create and sell were set forth in writing and distributed to the students by their teacher. App. 3a. These guidelines provided that each product had to be homemade, with supplies that did not cost more than ten dollars. The product could not be food or a game of chance. Finally, the students were admonished that in "the spirit of competition" they should make a product that "stands out from all the others." App. 3a-4a. The terms of the assignment did not contain a restriction on the creation and sale of religiously-oriented products.

For his product in Classroom City, Joel Curry created a candy-cane-shaped ornament with an attached booklet entitled "The Meaning of the Candy Cane." It read as follows:

> The Meaning of the Candy Cane
>
> Hard candy: Reminds us that Jesus is like a "rock," strong and dependable.
>
> The color Red: Is for God's love that sent Jesus to give his life for us on the cross.

> The Stripes: Remind us of Jesus' suffering-his crown of thorns, the wounds in his hands and feet; and the cross on which he died.
>
> Peppermint Flavor: Is like the gift of spices from the wise men.
>
> White Candy: Stands for Jesus as the holy, sinless Son of God.
>
> Cane: Is like a staff used by shepherds in caring for sheep. Jesus leads us and watches over us when we trust Him.

App. 4a-5a.

During the first day of the Classroom City event in the school gymnasium, Joel's social studies teacher Miss Sweebe (who directed the Classroom City project), App. 3a, learned that Joel's candy cane product had attached to it a card with a religious message. App. 5a. Miss Sweebe informed Joel that while he had done nothing wrong, he was nevertheless not permitted to sell the ornaments with the cards attached until after she spoke with Principal Hensinger, App. 6a, for she doubted the permissibility of student religious speech in a public school. Sweebe Tr. (Dkt. 17) at 43; Hensinger Tr. (Dkt. 16) at 16.

Joel's use of the ornament with the attached card met the assignment criteria in all respects. Stip. Facts (Dkt. 15) at ¶ 19. The record contains no evidence that Joel's incorporation of the pamphlet in his product for sale caused disruption of any sort at the school, interfered with the operation or objectives of Classroom City, or did not conform to the instructions for participation in Classroom City. Nonetheless, Principal Hensinger forbade Joel to sell

the candy cane with the attached pamphlet. *Id.* at ¶ 30. Joel clipped the cards off of his ornaments and sold the ornaments without them. *Id.* at ¶¶ 21, 33.

Principal Hensinger's motivation for censorship was borne of opposition to the religious perspective of Joel's speech. App. 7a. Principal Hensinger testified that she viewed Joel's candy-cane pamphlet to be "overtly religious." Hensinger Tr. (Dkt. 16) at 40. As she put it, Joel's pamphlet "makes statements that are clearly religious. It mentions Jesus's name a number of times," and it purports to be "the" meaning of the candy cane, rather than simply "my" meaning. *Id.* Also, the booklet expressed the viewpoint that Jesus is the son of God, and Lord and Savior. "Not everyone believes that," Principal Hensinger explained. *Id.* at 40-41.

Principal Hensinger would have allowed speech on Joel's candy cane pamphlet that discussed the candy cane from a historical perspective, but not speech that did so from a religious perspective. *Id.* at 22.

II. Proceedings Below

A. District Court

On June 14, 2004, Petitioner Joel Curry sued Saginaw City School District and Principal Irene Hensinger pursuant to 42 U.S.C. § 1983, alleging that his rights under the First and Fourteenth Amendments had been violated through the censorship of his candy-cane project, and seeking injunctive and declaratory relief, and damages. Complaint (Dkt. 1). After discovery, the parties filed cross-motions for summary judgment. Defs.' SJ

Motion (Dkt. 22); Pls.' SJ Motion (Dkt. 25). The district court denied Joel Curry's motion for summary judgment and granted the summary judgment motion of the school district and Principal Hensinger. App. B (Dkt. 50). In so ruling, the court determined that no basis for school district liability existed, App. 15b, and that Principal Hensinger should be granted qualified immunity. App 38b.

The district court concluded that Principal Hensinger had indeed violated Joel's First Amendment right to the freedom of speech. App. 32b. The court did not resolve whether the legal standard that governs the censorship of student speech in this case was that presented in *Tinker v. Des Moines Ind. Cmty. School Dist.*, 393 U.S. 503 (1969), or the standard announced in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Instead, the court announced that it "need not resolve that dispute . . . because the Court finds that the defendant's restriction of Joel Curry's speech cannot be justified even under *Hazelwood*'s more generous standards." App. 20b.

The district court recounted that the defendants had proposed three pedagogical concerns in defense of the censorship: "(1) ensuring that the participants learn the lesson the activity is required to teach; (2) eliminating the threat of disruption; and (3) ensuring students['] views are not mistakenly attributed to the school, which might result in a violation by the school of the Establishment Clause." App. 20b-21b. The court rejected each of these proposed justifications as inadequate.

First, the court found that Joel's candy cane project complied with assignment guidelines and

facilitated full attainment of the pedagogical goals intended thereby. App. 22b. The court noted that there is a market niche for religious products, and thus religious aspects of a product often enhance its marketability. App. 22b.

Second, the court found that Principal Hensinger had presented no evidentiary basis to justify a pedagogical concern to avoid disruption from the religious nature of Joel's product. App. 22b. The students touring Classroom City's fifty-six storefronts were free to disregard any and all products, and the principal's undifferentiated apprehension of disturbance does not constitute a valid concern. App. 23b.

Thirdly, the district court rejected as unfounded the defendants' alleged fear of perceived endorsement and thus an Establishment Clause violation, concluding that "no reasonable observer would attribute to the school the religious message on the card attached to [Joel's] candy cane ornament." App. 31b. The court explained that the class exercise would have been seen as it was intended: to approximate a city market environment where products and viewpoints converge. "A product bearing a religious card certainly would be allowed in a city's marketplace." App. 31b. Additionally, the allowance of Joel's project as one component in the din of the marketplace simulation in which students were free to tour and avoid as they wished, does not give rise to legitimate endorsement worries. App. 31b-32b. "Allowing the sale of the card along with the ornament would not have been perceived by a casual observer as an endorsement of a religious message by the school." App. 32b.

While finding a constitutional violation, the district court granted Principal Hensinger qualified immunity, finding that a student's right to make religious statements in a quasi-classroom context was not clearly established. App. 36b. The court explained that "the Supreme Court has articulated at least three different tests to be applied to speech restrictions in the academic arena," and it would not be clear to a school administrator which test would apply to student speech in the context of Classroom City. App. 36b.[1]

B. Sixth Circuit panel

The Currys appealed the judgment in favor of Principal Hensinger to the Sixth Circuit. The Sixth Circuit panel affirmed the district court's judgment, though on the alternate ground that Principal Hensinger had not infringed Joel's constitutional right to the freedom of speech.

The court first determined that Joel's case was governed by the standard presented in this Court's *Hazelwood* decision, rather than that set forth in *Tinker*. The court identified the *Hazelwood* standard to apply to speech "made as part of school activities," and "made as part of the school curriculum." App. 11a. The court offered that *Tinker*, on the other hand, applies "when the problem involves direct,

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[1] However, the court did not explain how at least one of the three ostensibly elusive "academic arena" speech tests would have authorized Principal Hensinger's censorship in this case. Indeed, the court had earlier held that neither *Tinker* nor *Hazelwood* would permit such censorship, leading the court to say that it was therefore unnecessary to determine which of those two tests applied. App. 20b.

primary First Amendment rights akin to pure speech," App. 11a-12a (citations and internal quotation marks omitted). (Oddly, that description of *Tinker* appears equally descriptive of the speech covered by *Hazelwood*.)

Elaborating on the *Hazelwood* test, the court stated that only when a school official's censorship of a student has "no valid educational purpose" is that student's First Amendment speech right implicated. App. 15a. Applying that standard to Joel's case, the court stated:

> Here, the principal decided that allowing the card would not be appropriate because it was religious, and therefore could offend other students and their parents (in fact the religious card did offend Joel's business partner for Classroom City).[2] The school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict

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[2] To the contrary, the record shows (by means of a single quotation) only that Joel's business partner was dismissive of the market appeal of Joel's product.

> with the private beliefs of the student and his or her family.")

App. 15a-16a (first and third emphases added). The dicta from *Edwards*—an Establishment Clause case involving the legal obligation related to a State's curricular decisions—was the only authority the court offered to warrant its rule that censoring student religious speech serves a valid educational purpose under *Hazelwood*.

C. En banc petition

The Currys petitioned for rehearing en banc on January 30, 2008. The panel denied the petition on May 13, 2008. App. C.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit announced an unprecedented rule classifying student religious speech as *per se* offensive, and therefore properly subject to censorship by school officials. The court designated the eradication of student speech from a religious point of view as serving the "valid educational purpose" of removing potential offense to other students and their parents, and therefore authorized under the standard announced by this Court in *Hazelwood Sch. Dist. v. Kuhlmeier*—even when such student speech complies entirely with and serves the purposes of the assignment to which it is responsive.

By treating genuine student speech as *per se* intolerable because of its religious viewpoint, the Sixth Circuit has turned the First Amendment upside down. *See Capitol Square Review and*

Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("[i]ndeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince"). Moreover, this ruling directly conflicts with the U.S. Department of Education official policy directive regarding such speech.

This Court should grant review.

I. THE SIXTH CIRCUIT'S HOLDING THAT SCHOOLS MAY CENSOR RELIGIOUS SPEECH AS *PER SE* OFFENSIVE, AND THAT SUCH CENSORSHIP SERVES A VALID PEDAGOGICAL INTEREST, CONFLICTS WITH THIS COURT'S DECISIONS.

The Sixth Circuit ruled that eliminating student religious viewpoints from student-designed school projects serves a "valid educational purpose" under *Hazelwood*'s First Amendment standard. Under this ruling, schools may categorically ban religious viewpoints or symbols from all student art, science, or literature projects, and indeed even from their classroom discussion. Such a rule cannot be reconciled with this Court's First Amendment jurisprudence.

A. Eliminating student religious viewpoints from student projects serves no valid educational purpose.

Censoring decorous student speech simply because its religious point of view may not be universally embraced serves no valid pedagogical interest ever acknowledged by this Court. To the contrary, this Court condemns government silencing of diverse student voices in an effort to maintain a homogenized school environment. Such state-imposed uniformity is contrary to the purposes of our educational system and is counter-productive of the goal of preparing students for life in our pluralistic democratic polity.

As this Court explained in *Tinker*:

> [t]he classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.

393 U.S. at 512 (citation and internal quotation marks omitted) (emphasis added). Importantly, "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. "[I]f educators intentionally may eliminate all diversity of thought, the school will 'strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., dissenting) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

This Court has also explained that "public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Pico*, 457 U.S. at 864 (plurality) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Addressing that preparatory objective, one court has observed that "[t]he presence in a single school of children from varied backgrounds is an important element in the preparation of young people for active participation in the social and political affairs of our democracy." *Pennsylvania Human Relations Commission v. Norristown Area Sch. Dist.*, 473 Pa. 334, 353 (Pa. 1977) (emphasis added).

The Sixth Circuit disregards these principles and proposes instead that censorship is a pedagogically appropriate response to religious students' public deviations from ideological uniformity. This cannot be reconciled with any of the foregoing authorities, or with the educational policy expressed in *Hazelwood* itself. Since, as this Court stated in *Hazelwood*, schools are to serve as "'a principal instrument in awakening the child to cultural values... and in helping him to adjust normally to his environment,'" *Hazelwood*, 484 U.S. at 271 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)), standards of valid pedagogy must countenance that "[t]he fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . . One can hardly respect the system of education that would

leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared." *People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

Then-Judge Alito, writing critically in a similar context to that of this case, expounded on the pernicious implications of sanctioning censorship employed to eliminate disagreement:

> If the panel's understanding of *Hazelwood* were correct, it would lead to disturbing results. Public school students . . . when called upon in class to express their views on important subjects, could be prevented from expressing any views that school officials could reasonably believe would cause "resentment" by other students or their parents. If this represented a correct interpretation of the First Amendment, the school officials in *Tinker* could have permitted students, as part of a class discussion, to express views in favor of, but not against, the war in Vietnam because some students plainly resented the expression of antiwar views. *See* 393 U.S. at 509 n.3. Today, school officials could permit students to express views on only one side of other currently controversial issues if the banned expression would cause resentment by some in the school, as it very likely would. Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster.

C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 214 (3d Cir. 2000) (Alito, J., dissenting from the en banc court's refusal to address the substantive legal issue).

The Sixth Circuit erred profoundly in determining that the elimination of student religious viewpoints from student projects serves a valid educational purpose. The presentation of student religious speech (like Joel's) is no danger to our schools or to educational interests. The danger lies rather in unlimited deference to school officials' arbitrary definition of school-house orthodoxy, thereby oppressing parents and their children who are compelled to attend schools that have the power both to teach them values that may (and often do) contradict what is taught them at home, and to simultaneously forbid these children to develop and respectfully express their own points of view.[3]

B. The First Amendment bars the discriminatory exclusion of religious viewpoints as such.

Not only is the general elimination of the marketplace of ideas from the classroom inconsistent with valid pedagogy under the First Amendment, the targeted censorship of religious viewpoints in particular is an invalid educational purpose, as a

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[3] Ironically, the Sixth Circuit's imposition of an "anti-offense" editorial restraint on student speech does nothing to protect students against offensive teacher speech. Indeed, courts have regularly rejected parental challenges to official instruction which the parents and children deem objectionable. *See Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995); *Mozert v. Hawkins Co. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

matter of unbending constitutional proscription. *Hazelwood* is a First Amendment standard, and any analysis under its auspices of what constitutes a "legitimate" pedagogical concern requires reference to the principles of the mutually-informing clauses of the First Amendment. In such light, school censorship which uniquely targets religious speech cannot be classified as "legitimate" pedagogy.

This Court has explained that "[i]ndeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.*

It is not only the speech clause that safeguards religious expression, for "private religious speech endorsing religion... the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (emphasis added). Under the Free Exercise Clause, State action targeting religion for unique burdens is prohibited, unless the State can satisfy the most rigorous of scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 546 (1993). "Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Id.* at 532 (citation and internal quotation marks omitted).

So also has the Establishment Clause been interpreted to forbid "an official purpose to disapprove of . . . religion in general." *Id.*

In view of these constitutional norms, and "when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause," *Pinette*, 515 U.S. at 767, government censorship of private student religious speech simply because of its religious perspective cannot be a legitimate government aim under the First Amendment standard of *Hazelwood*. An educational policy embracing *per se* viewpoint hostility to private religious speech simply cannot pass muster so long as the First Amendment retains its meaning.

C. The Sixth Circuit's ruling conflicts with the guidelines of the U.S. Department of Education.

The decision below repudiates significant components of the federal Department of Education instructions that public schools throughout the country are obliged to follow. As required by the No Child Left Behind Act of 2001 (NCLB) (*see* 20 U.S.C. §7904(a)), the Secretary of Education has issued instruction to public school officials on the constitutional rights of religious speech and exercise by public school students: *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003). All public elementary and secondary schools receiving federal funds under the NCLB must certify policy compliance with the contents of the *Guidance* instructions. *Id.* at 9646;

20 U.S.C. § 7904 (b). The content of the *Guidance* has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. 68 Fed. Reg. at 9646.

The *Guidance* standards identify that pedagogical concerns do not excuse censorship of students' religious speech. "[L]ocal school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against student prayer or religious speech." 68 Fed. Reg. at 9647 (emphasis added). In a section of the *Guidance* provisions particularly relevant to this case, entitled "Religious Expression and Prayer in Class Assignments," the Department guidelines again show that "legitimate" pedagogy is inconsistent with censorship of student religious viewpoints:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary

> quality) and neither penalized nor rewarded on account of its religious content.

Id. at 9647 (emphasis added). The Department in the document further explains that "[s]tudent remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience." *Id.*[4]

Corresponding to its conflict with this Court's decisions, the Sixth Circuit's holding stands in opposition to the standards the federal government requires of all public elementary and secondary schools in the country receiving federal education funds. This court should grant review.

II. THE SIXTH CIRCUIT ERRED BY APPLYING *HAZELWOOD*, NOT *TINKER*, TO STUDENT-DESIGNED PROJECTS.

The Sixth Circuit's erroneous approval of the *per se* suppression of student religious viewpoints provides sufficient grounds for review. Also worthy of review, however, is the Sixth Circuit's invocation of the wrong constitutional standard—*Hazelwood*, instead of the proper *Tinker* test—for evaluating school restrictions on genuine private student speech in student-designed projects.

In *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969), this Court held that school officials may not penalize or censor student speech

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[4] "The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Chandler v. Siegleman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988), this Court introduced the refinement that school officials may regulate student speech in a way "reasonably related to legitimate pedagogical concerns" when that speech is presented in a school-sponsored expressive activity that carries the reasonable perception of school imprimatur.

If, as the Sixth Circuit contends, *Hazelwood* applies to all speech uttered by students in a curricular context (*i.e.*, in the classroom setting or during a school activity), *Tinker* would be relegated to governing student speech in the hallways and cafeteria, and this Court's "imprimatur analysis" in *Hazelwood* would become superfluous. Such a conclusion cannot be squared with this Court's case law.

The *Tinker* Court clearly understood the First Amendment to protect (non-disruptive) speech in the classroom, not just the hallways. *See Tinker*, 393 U.S. at 512 ("[t]he classroom is peculiarly the 'marketplace of ideas.' . . . The principle of these cases is not confined [merely] to the supervised and ordained discussion which takes place in the classroom. . . . A student's rights . . . do not embrace merely the classroom hours"); *id.* at 513 ("we do not confine the permissible exercise of First Amendment rights to . . . supervised and ordained discussion in a school classroom"); *id.* at 508 ("[a]ny word spoken, in class . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk").

In *Hazelwood*, this Court did not hold that *Tinker* was now displaced by a new rule that encompasses all student speech in the classroom or in the context of "school activities," as the Sixth Circuit held. Instead, this Court in *Hazelwood* identified the application of its rule to student speech in the context of

> school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

484 U.S. at 271 (emphasis added). In fact, this Court on no less than four occasions in *Hazelwood* recited as exemplary instances of school-sponsored student speech that which is (1) published by the school in its newspaper, and (2) presented in theatrical productions produced by the school. *Id.* at 271-73. These imprimatur-bearing, official speech organs exemplify contexts in which the school not merely "tolerates," but instead "affirmatively . . . promote[s]," *id.* at 270-71, speech that is "disseminated under [the school's] auspices," *id.* at 272, and expressive activities to which the school "lend[s] its name and resources." *Id.* at 272-73.[5]

By contrast, in many contexts it is clearly the student who speaks, not the school. Student science

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[5] The Ninth Circuit acknowledged *Hazelwood*'s distinction between allowance and sponsorship in *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007), where the court identified student speech presented in a student government campaign as not school-sponsored. "This is a scenario in which the University is not sponsoring, as in *Hazelwood*, any of the candidates' speech but is allowing the campaign-related speech." *Id.* at 829 n.9.

projects, literature compositions, art projects, show-and-tell, student book reports on student-selected books, etc., all represent genuine student speech which may not fairly be imputed to the school. The individual student messages presented in response to such opportunities are merely school-facilitated, not adopted by the school as its own and promoted under its banner.[6] Speech presented in an official school organ like the institutional newspaper or school-produced dramatic production is categorically unique (a proposition implicit in the repeated appeal to such examples by this Court in *Hazelwood*), for such official communicative vehicles reflect the school's own speech. *See Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995) ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. *See e.g.*, . . . *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272, 108 S.Ct. 562") (emphasis added).

This Court in *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2627 (2007), reaffirmed that the critical evaluation in determining the application of *Hazelwood* is the focus on reasonable perception of school imprimatur. In *Morse*, this Court quickly dismissed the relevance of *Hazelwood* to the facts of that case with the observation that "no one would reasonably believe that Frederick's banner bore the

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[6] "Permitting students to speak religiously . . . . signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression." *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999).

school's imprimatur." *Id.* at 2627. *See also id.* at 2637 (Alito, J., concurring) ("*Hazelwood*... allows a school to regulate what is in essence the school's own speech"). Though Frederick's speech was presented during a school-sanctioned activity, *id.* at 2623-24, the Court assigned no significance to that fact in its brief evaluation of *Hazelwood*'s relevance.

In contrast to the terms of *Hazelwood* and this Court's method in *Morse* is the Sixth Circuit's decision below, wherein the court forewent consideration of the reasonable perception of school imprimatur, instead applying *Hazelwood* because Joel's speech was made "as part of the school curriculum." App. 11a. Similarly, the Tenth Circuit in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), has eliminated the imprimatur evaluation in exchange for wooden invocation of the curricular. "[S]peech which is prescribed as part of the official school curriculum in connection with a classroom exercise is school-sponsored speech," thus requiring application of *Hazelwood*. *Id.* at 1286.

Opposing that approach is the Third Circuit, which has taken seriously the imprimatur component of *Hazelwood*, as evidenced in *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. School Dist.*, 386 F.3d 514 (3rd Cir. 2004). There the court held that the distribution by school officials of fliers for a religious extracurricular organization was not school-sponsored speech (even though the fliers were to be handed out on school grounds and at school functions), for the school had offered the distribution opportunity to a wide range of private groups; thus it was not reasonable to

believe that the administration actually sponsored every viewpoint represented. *Id.* at 525-26.

The homemade products in Classroom City were student-designed responses to an assignment and were presented in a way that left no doubt of their being the products of their student creators. To suggest that each of the hundred-plus individual fifth-grade student projects represented official school speech is nonsense. "[N]othing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 213 (2000) (Alito, J., dissenting from decision en banc).

The Sixth Circuit erred by forcing student projects into the Procrustean bed of official school speech organs. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality). "Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all." *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993).

CONCLUSION

This Court should grant review.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOEL CURRY, a minor, by and through his parents, PAUL & MELANIE CURRY,

Plaintiff-Appellant,

v.

IRENE HENSINER, Principal Handley School,

Defendant-Appellee,

SAGINAW CITY SCHOOL DISTRICT,

Defendant.

No. 06-2439

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 04-10143 – David M. Lawsom, District Judge.

Argued: September 14, 2007

Decided and Filed: January 16, 2008

Before: NORRIS, GIBBONS, and ROGERS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. In this appeal, we address whether an elementary school student has a First Amendment right to promote an unsolicited religious message during an organized curricular activity.

Plaintiff Joel Curry and his parents filed suit against the School District of Saginaw, Michigan, and Irene Hensinger, the principal of the school Joel attended, alleging that Joel's constitutional rights were abridged when Principal Hensinger did not allow Joel to "sell" pipe-cleaner candy canes if a card bearing a religious message was attached. A "sale" of goods was to occur at a three-day simulated marketplace event that existed as part of the fifth grade curriculum at Joel's elementary school.

The district court granted defendants' motion for summary judgment as to all parties. It first reasoned that no violation of Joel's First Amendment right could be attributed to the school district. Turning to Principal Hensinger, the court concluded that she had abridged Joel's constitutional right to freedom of speech, but enjoyed qualified immunity from liability because the precise contours of that right were not clearly established.

On appeal, Plaintiff contends that the district court erred in its application of qualified immunity to Principal Hensinger. We conclude that Principal Hensinger did not violate a constitutional right enjoyed by Joel and we therefore affirm the district court's grant of summary judgment, albeit on different grounds.

I.

Joel Curry was a fifth grade student at the Handley School in Saginaw, Michigan during the 2003-2004 academic year. As part of the fifth grade curriculum, students participated in an exercise called "Classroom City." The event was designed to provide students a variety of learning experiences

including exposure to literature, marketing, government, civics, economics, and mathematics. The exercise culminated in a three-day event held in the school gymnasium during which students, using faux school currency, sold goods they had produced specifically for the event.

Lisa Sweebe, Joel's social studies teacher, managed the exercise. In early November, Sweebe sent out packets to students and their parents describing Classroom City and what was expected of the students. The 2003 Classroom City was held on December 11, 12, and 16. The guidelines for the assignment stated:

- You will need to create, market, and sell a product for the simulation Class Room City.
- You cannot sell or use food products.
- You cannot play or sell games of chance.
- Your product must be something that is handmade.
- Materials and supplies cannot exceed $10.00 in cost.
- You can sell as many as three different products.
- You will need a sample of your product(s) to do an all school market survey. You will receive more details from your math teacher concerning the market survey.
- Your market analysis will help you determine how much inventory you will need to start your business.
- Remember as you prepare for your business that part of the spirit of the

competition is to have a product that stands out from all the others.

As indicated above, before a product could be approved for sale, students were required to conduct a market survey. Participants created a prototype of their products, and a representative sample of the student body taken from all grades was asked to indicate which products they might be willing to purchase. During the actual three-day event, the entire student body, under the supervision of the physical education instructor, attended Classroom City and made purchases at the mock storefronts with the faux currency. The stores were monitored to see which students accumulated the most money.

At the suggestion of his mother, Joel decided to make Christmas tree ornaments in the shape of candy canes utilizing pipe cleaners and beads. Joel's father offered to create cards to attach to the ornaments explaining how the candy cane can be viewed as a symbol of Christianity. However, when Joel submitted his ornament prototype for the market survey, he did not attach the card.

Sometime after the market survey was completed, Joel added a card to the ornaments he planned to sell during Classroom City. It read as follows:

The Meaning of the Candy Cane

Hard candy: Reminds us that Jesus is like a "rock," strong and dependable.

The color Red: Is for God's love that sent Jesus to give his life for us on the cross.

> The Stripes: Remind us of Jesus' suffering-his crown of thorns, the wounds in his hands and feet; and the cross on which he died.
>
> Peppermint Flavor: Is like the gift of spices from the wise men.
>
> White Candy: Stands for Jesus as the holy, sinless Son of God.
>
> Cane: Is like a staff used by shepherds in caring for sheep. Jesus leads us and watches over us when we Trust him.

Joel and his parents did not alert school administrators to the addition of the card.

Joel was paired for the exercise with Siddarth Reddy. The two decided that Siddarth would prepare the storefront and Joel would prepare the products to sell. When Siddarth learned of the card, he informed Joel that "[n]obody wants to hear about Jesus." Siddarth subsequently decided to make his own products for sale, resulting in his bearing the burden of both constructing the storefront and making a product for sale. During the event itself, Joel manned the storefront during the morning hours and Siddarth during the afternoon.

On December 11, 2003, the first day of the Classroom City event, Jennifer Harris, the gym teacher, who was supervising Classroom City, sought the counsel of Lisa Sweebe when she discovered that Joel was "selling religious items." Sweebe proceeded to Joel's storefront to see what he was selling. Joel showed Sweebe his ornament with the attached card. Sweebe asked Joel if the card had been attached at the time of the market survey, and

Joel said that it had not. Although Joel's product did not violate the rules of Classroom City, Sweebe told Joel that he could not sell the ornament with the card attached until she had a chance to talk with the principal, Irene Hensinger. She further stated that he had done nothing wrong, but she was concerned about the card's religious content and whether other students might be offended. For the rest of the day, Joel sold his ornaments without the card.

Sweebe initially was unable to locate Hensinger. Around noon, Joel's mother arrived at the school. After learning that Joel was not permitted to sell the ornament with the attachment, she told Sweebe that the use of the cards fell within Joel's constitutional rights as a student and offered to bring in some literature supporting her position.

Later that afternoon, Sweebe left a note for Hensinger, which included a copy of the card's content along with the question, "Can this be sold? Mom says this is within Joel's rights? I need your okay." Later, when Sweebe discussed the matter with Hensinger, she also provided the literature that Joel's mother had furnished. Hensinger, in turn, passed the information on to assistant superintendent Dr. John Norwood.

That evening at home, Joel told his mother that he wished to sell the ornaments with the card so that others could learn about Jesus. The following day, December 12, Joel's mother placed a copy of an article written by an attorney entitled "Students' Rights on Public School Campuses" in Sweebe's school mailbox. She included a note informing Sweebe, "[t]here is just a ton of info on the internet

[sic] from various organizations. Some of the groups are even offering free counsel to anyone who may have questions about students' rights to free speech."

This article along with the note was also forwarded to Dr. Norwood by Hensinger. At some point between December 12 and 16, Hensinger spoke to Dr. Norwood about Joel's ornament and attached card. Both were of the opinion that the use of the card was inappropriate. On the morning of December 16, Hensinger met with Joel's mother and informed her that, after consideration, the school would not permit Joel to sell the ornaments with the attached card. Hensinger further stated that Classroom City was considered instructional time and, because the cards contained religious content, their use would not be permitted. If Joel still wished to sell the candy canes with the card, he could do so after school in the parking lot. Joel did not attempt to sell his ornaments with the cards in the parking lot. Instead, he sold the ornaments without the cards during the exercise.

Joel received a grade of "A" for his part of the Classroom City project, and was not disciplined for attempting to sell the candy canes with the religious cards. The parties agree that Hensinger's actions were taken in her official capacity as principal of the school.

II.

We review a district court's grant of summary judgment de novo, employing the same standard as the district court. *Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir.2004). Summary judgment is appropriate where the record shows that "there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

A. Qualified Immunity

A claim of qualified immunity is ordinarily examined in two steps: "[f]irst, a court must consider whether the facts, viewed in the light most favorable to the plaintiff, 'show the offic[ial's] conduct violated a constitutional right,' " and second, "the court must then decide 'whether the right was clearly established.' " *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 172 (6th Cir.2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). The Sixth Circuit has occasionally expanded that inquiry into a three-step sequential analysis: "The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is 'whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights.' " *Tucker v. City of Richmond, Ky.*, 388 F.3d 216, 219 (6th Cir.2004) (quoting *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir.2002)). The third inquiry impacts the analysis when despite the violation of a clearly established constitutional right, the official's conduct was objectively reasonable, and so should still enjoy qualified immunity. *See Sample v. Bailey*, 409 F.3d 689, 696 n. 3 (6th Cir.2005) ("If we find the first two

requirements have been met, the final inquiry is 'whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.' " (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003))).

B. Constitutional Right

Plaintiff's complaint alleged multiple possible constitutional violations relating to the suppression of Joel's card, including the right to freedom of expression, and free exercise of religion. The district court decided, and "plaintiffs agreed that the free exercise claim was subsumed in the free expression claim." *Curry ex. rel. Curry v. School Dist. of City of Saginaw*, 452 F.Supp.2d 723, 740 (E.D.Mich.2006). On appeal, Plaintiff claims only a violation of the constitutional right to freedom of speech.

In order to determine whether said constitutional right was violated in this case, we must first decide the framework under which Joel's speech should be analyzed. If the expression was private expression, which just happened to occur at school, we look to *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (noting that private expression may be restricted only upon a showing that such expression "would substantially interfere with the work of the school or impinge upon the rights of other students"). However, when the expression is school-sponsored speech, such as a school newspaper, or speech made as part of a school's curriculum, schools are afforded greater latitude to restrict the speech. *Hazelwood Sch. Dist. v.*

Kuhlmeier, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

It is undisputed that Classroom City was part of the fifth grade curriculum. According to the Supreme Court, the *Hazelwood* standard applies when

> students, parents, and members of the public might reasonably perceive [the expression] to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood, 484 U.S. at 271, 108 S.Ct. 562. Plaintiff suggests that *Hazelwood* only applies if the audience might mistake the speech as originating from the school. However, that reading is too narrow.[7] This

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[7] For speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school, only that an observer would reasonably perceive that the school approved the speech. Imprimatur is defined as "[o]fficial approval; sanction." *American Heritage Dictionary 822* (4th ed.2000); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (stating that an "open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.") (emphasis added) (citation omitted). Classroom City products were to be approved by the school, and this fact

court has applied the *Hazelwood* standard when the speech at issue was made as part of school activities:

> The Supreme Court has drawn a distinction between "personal expression that happens to occur on school premises" and expressive activities that are "sponsored" by the school and "may fairly be characterized as part of the school curriculum...." *Hazelwood*, 484 U.S. at 271, 108 S.Ct. at 569-570, 98 L.Ed.2d at 605. Speech sponsored by the school is subject to "greater control" by school authorities than speech not so sponsored, because educators have a legitimate interest in assuring that participants in the sponsored activity "learn whatever lessons the activity is designed to teach...." *Id.* As long as the actions of the educators are "reasonably related to legitimate pedagogical concerns," therefore, the *Hazelwood* Court held, as we have seen, that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities...." *Id.*, 484 U.S. at 272, 108 S.Ct. at 571, 98 L.Ed.2d at 606.

Poling v. Murphy, 872 F.2d 757, 762 (6th Cir.1989). Expressive activities made as part of the school curriculum call for a *Hazelwood* analysis, while the high standard of *Tinker* is reserved for when the "problem involves direct, primary First Amendment

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was known by students and parents. Even though Joel and his parents circumvented the product approval process, students and parents were unaware of this, and reasonably would have perceived the product as school-approved if it had been sold.

rights akin to 'pure speech.' " *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468 (6th Cir.2000) (quoting *Tinker*, 393 U.S. at 508, 89 S.Ct. 733).

"While children [ ] do not 'shed their constitutional rights ... at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56, 115 S.Ct. 2386, 132 L.Ed.2d 564, (1995) (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. 733). Local school officials are best situated to determine what is appropriate for children in school, and constitutional claims have consistently been given a less rigorous review in school settings. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir.2005) ("The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.") (quoting *Tinker*, 393 U.S. at 507, 89 S.Ct. 733). The *Blau* court went on to state that "[i]n the First Amendment arena and other arenas as well, the Supreme Court thus has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies." *Id.* " 'The very complexity of the problems of ... managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them.' " *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 237 (6th Cir.2005) (Sutton, J., concurring) (quoting *San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d

16 (1973)). It is often the case that "the determination of what manner of speech in the classroom ... is inappropriate properly rests with the school board rather than with the federal courts." *Id.* (quoting *Hazelwood*, 484 U.S. at 267, 108 S.Ct. 562).

The district court declined to decide the standard under which to judge the constitutionality of preventing Joel Curry from selling his product with the religious card attachment. Instead, it held that "the defendant's restriction of Joel Curry's speech cannot be justified even under *Hazelwood*' s more generous standards." *Curry*, 452 F.Supp.2d at 735. Because we conclude that the appropriate standard is that of *Hazelwood*, the restriction of Joel's expression was constitutionally permissible only if it was "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562.

The district court confined its analysis of pedagogical concerns to the academic variety, stating that "[t]he lessons Classroom City was designed to teach presumably included economics, marketing, civics, and entrepreneurialism. Standing alone, the candy canes with a religious card attached met those ostensible goals." *Curry*, 452 F.Supp.2d at 736. However, "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic...." *Poling*, 872 F.2d at 762 (teaching a student civility toward others is a legitimate pedagogical concern). Plaintiff at oral argument emphasized that the written instructions distributed before the event did not preclude a religious product. However, the constitutional analysis of the restriction would be the same whether the school proscribed religious

products before or during the event. The fact that student expression as part of a curricular activity meets the stated parameters of an assignment does not insulate it from school regulation.

"In an elementary school setting, the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity." *Walz ex rel. Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271, 278 (3d Cir.2003) (holding that a student's First Amendment right to freedom of speech was not violated when the student was prevented from passing out candy canes with a religious card attached at a classroom party). Joel's candy cane with the religious card attached was not simply a personal religious observance, analogous to wearing a cross, or a t-shirt with a slogan. The expression was part of a curricular assignment, and not one that invited personal views- the assignment encouraged creative products, but it did not solicit viewpoints. The *Walz* court noted that there is "a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view." *Id.* at 278-79 (citing *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir.2003) ("The [School] District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to

distribute literature that itself contains proselytizing language. The difference is subtle but important.")).

In this case, the admitted purpose of the plaintiff in distributing the candy cane was to promote Jesus to the other students. The school's assignment requiring students to develop products for sale in Classroom City cannot be seen as a solicitation of personal views on a subject; Joel was in fifth grade and the potential audience included much younger students (these products were to be sold to the entire elementary school student body); and the school had complete control over Classroom City, including a formal approval process for the products to be sold, which Joel evaded.

"It is only when the decision to censor ... student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights." *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562 (citation omitted). *Hazelwood* does not require us to balance the gravity of the school's educational purpose against Joel's First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid. Here, the principal decided that allowing the card would not be appropriate because it was religious, and therefore could offend other students and their parents (in fact the religious card did offend Joel's business partner for Classroom City). The school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a

valid educational purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.").

Notably, we are not called upon to evaluate whether the principal made the best decision in disallowing the card. "[A] federal court is obviously not the ideal body to try to answer such a question." *Poling*, 872 F.2d at 761. Instead we hold only that the principal's determination that the religious card should not be permitted was the product of her reasonable evaluation of legitimate pedagogical concerns, and fell within her discretion as a school administrator, and therefore did not violate any right Joel enjoyed under the First Amendment.

III.

Because we conclude that Principal Hensinger's decision to prevent Joel from selling the candy cane with its religious attachment was driven by legitimate pedagogical concerns, Joel's constitutional rights were not abridged. Since there was no constitutional violation, the qualified immunity inquiry is ended. We **AFFIRM** the district court's grant of summary judgment for the defendant.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL CURRY, a minor, by and through his parents, PAUL AND MELANIE CURRY,

Plaintiffs,

v.

SCHOOL DISTRICT OF THE CITY OF SAGINAW, and IRENE HENSINGER,

Defendants.

Case Number: 04-10143

Honorable David M. Lawson

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The parents of Joel Curry, a fifth-grade student at a public school in Saginaw, Michigan, became upset at Joel's teachers who would not let him display a Christian message on a school project. Taking offense at this perceived slight, they filed a federal lawsuit against the school district and the grade school principal alleging that Joel's constitutional rights were violated. The parties have filed cross motions for summary judgment. The United States filed a brief amicus curie on Joel's

behalf. The Court heard oral argument on October 6, 2005. The Court now finds that although the defendants did not violate Joel's constitutional rights under the Fourteenth Amendment or the Free Exercise Clause of the First Amendment, the actions did abridge Joel's First Amendment speech rights. However, the plaintiffs have not demonstrated that the school district failed to train its personnel in dealing with such issues or otherwise established municipal liability. In addition, the Court finds that the school principal is entitled to qualified immunity. Finally, the request for declaratory and injunctive relief is moot. Therefore, the Court will deny the plaintiffs' motion for summary judgment, grant the defendants' motion for summary judgment, and dismiss the case with prejudice.

I.

The parties have stipulated to the facts of this case, which are summarized as follows:

Joel Curry, the plaintiff in this matter through his parents, was a fifth grade student at the Handley School in Saginaw, Michigan during the 2003-2004 academic year. At the time, Bridgitte Benjamin was Joel's homeroom teacher, Lisa Sweebe was his social studies instructor, and Shelly Dawson was his mathematics teacher. As part of the fifth grade curriculum, students participate in an exercise called "Classroom City." Classroom City takes a multi-disciplinary approach to learning by incorporating lessons on literature, marketing, government, civics, economics, and mathematics. The exercise culminates in a three-day event held in the school's gymnasium.

Sweebe, who manages the exercise, sent out packets describing the assignments to students and their parents in early November. The 2003 Classroom City event, which provoked the controversy here, was held on December 11, 12, and 16, 2003. The guidelines for assignment stated:

> You will need to create, market, and sell a product for the simulation Class Room City.
>
> - You cannot sell or use food products.
> - You cannot play or sell games of chance.
> - Your product must be something that is handmade.
> - Materials and supplies cannot exceed $10.00 in cost.
> - You can sell as many as three different products.
> - You will need a sample of your product(s) to do an all[-]school market survey. *You will receive more details from your math teacher concerning the market survey.*
> - Your market analysis will help you determine how much inventory you will need to start your business.
> - Remember as you prepare for your business that part of the spirit of the competition is to have a product that stands out from all the others.

Stip. Facts Ex. 1, Classroom City Project Guidelines. The assignment also asked students to construct a fictitious city in the gymnasium from cardboard refrigerator boxes. The students then elected a

mayor, city counsel members, several sheriffs, and a postmaster. The students, either by themselves or with a partner, constructed a storefront and made products to sell during the three-day event. They also drew up a description of their products in order to purchase a business license. Students advertised their products in the Classroom City newspaper. Students received a fixed amount of fictitious money to purchase advertising, pay for their business licences, and settle any fines assessed by the elected sheriffs.

Before a product could be approved for sale, students were required to conduct a market survey in advance of the event. Participants created a prototype of their products, and one-third of the student body decided which products they might purchase at the event. During the actual three-day event, the entire student body, under the supervision of the physical education instructor, attended Classroom City and made purchases at the mock storefronts with fictitious script. The stores were monitored to see which one had the most money at the end of the exercise.

Apparently unable to generate his own idea, Joel took the suggestion of his mother and decided to make ornaments made out of pipe cleaners and beads in the likeness of candy canes. Joel's father offered to create cards to attach to the ornaments after finding a glass candy-cane-like ornament in their home that came with a religious conjuration of its symbolism. Joel's father evidently had given out the glass candy cane ornaments at work. However, when Joel submitted his ornament prototype for the

market survey, he did not attach the card his father offered to make.

Sometime after the market survey was completed, Joel added the card to the ornaments he planned to sell during Classroom City. The card read:

> The Meaning of the Candy Cane
>
> Hard Candy: Reminds us that Jesus is like a "rock," strong and dependable.
>
> The Color Red: Is for God's love that sent Jesus to give his life for us on the cross.
>
> The Stripes: Remind us of Jesus' suffering- his crown of thorns, the wounds in his hands and feet; and the cross on which he died.
>
> Peppermint Flavor: Is like the gift of spices from the wise men.
>
> White Candy: Stands for Jesus as the holy, sinless Son of God.
>
> Cane: Is like a staff used by shepherds in caring for sheep. Jesus leads us and watches over us when we Trust him.
>
> The Letter "J": Is for the Name of Jesus, Our Lord & Savior, born on Christmas day

Stipulated Facts at ¶ 11. Joel and his parents brought the ornaments to school a few days prior to the event; however, they did not alert school administrators to the addition of the card. Nonetheless, Joel was not fined by the elected "sheriffs" during subsequent inspections.

Joel's partner for the exercise was a child of Asian Indian descent, Siddarth Reddy. The two decided that Siddarth would prepare the storefront and Joel would prepare the products to sell. When Siddarth learned of the card, he informed Joel that "[n]obody wants to hear about Jesus." Stipulated Facts at ¶ 15. Siddarth subsequently decided to make his own products for sale, resulting in his bearing the burden of constructing both the storefront and the product. During the event itself, Joel manned the storefront during the morning hours and Siddarth during the afternoon.

On December 11, 2003, the first day of the Classroom City event, Jennifer Harris, the gym teacher and student supervisor of Classroom City, sought the counsel of Lisa Sweebe, the event manager, when she discovered that Joel was "selling religious items." Stipulated Facts at ¶ 17. Sweebe proceeded to Joel's storefront to see what Joel was selling. Joel showed Sweebe his ornament with the attached card. Sweebe asked Joel if the card had been attached at the time of the market survey, and Joel indicated that it had not. Sweebe then looked at Joel's business license and noted that the ornament with the card fell within the product's description. Although Joel was not subject to a fine on that basis, Sweebe told Joel that he could not sell the card until she had a chance to talk with the principal, Irene Hensinger. She further stated that he had done nothing wrong, but she was concerned about the card's religious content and whether other students might be offended. For the rest of the day, Joel sold his ornaments without the card.

Sweebe initially was unable to locate Hensinger and left a message to speak with her. Around 12:20 p.m., Joel's mother arrived at the school. After learning that Joel was not allowed to sell the ornament with the attachment, she spoke to Sweebe. She told Sweebe that the use of the cards fell within Joel's constitutional rights as a student. Joel's mother indicated that she would bring in some literature regarding his rights; Sweebe agreed to review it and pass it along to Hensinger. Joel's mother stated that she knew the card had not been attached to the prototype at the time of the market survey.

Later that afternoon, Sweebe left a note for Hensinger, which contained a copy of the card's content along with the question, "Can this be sold? Mom says this is within Joel's rights? I need your okay." Stipulated Facts at ¶ 24. Eventually, Sweebe discussed the matter with Hensinger; Sweebe also provided Hensinger the information that Joel's mother furnished. Hennsiger, in turn, passed the information on to Dr. John Norwood, the assistant superintendent for school performance.

That evening at home, Joel told his mother that he wished to sell the ornaments with the card so that others could learn about Jesus. His mother believed that Joel had a constitutional right to sell the pipe-cleaner candy canes with the attachment. On December 12, 2003, Joel's mother placed a copy of an article written by attorney Mathew Staver entitled "Students' Rights on Public School Campuses" in Sweebe's school mailbox. She include a note informing Sweebe, "[t]here is just a ton of info on the internet [sic] from various organizations.

Some of the groups are even offering free counsel to anyone who may have questions about students' rights to free speech." Stipulated Facts at ¶ 27.

This article along with the note was forwarded to Dr. Norwood by Hensinger. At some point, between December 12 and 16, 2003, Hensinger finally spoke to Dr. Norwood about Joel's ornament and attached card. Both agreed that the use of the card was inappropriate. On the morning of December 16, 2003, Hensinger met with Joel's mother and informed her that after consideration, the school would not permit Joel to sell the ornaments with the attached card. Hensinger further stated that Classroom City was considered instructional time and because the cards contained religious content, they could not be permitted. If Joel still wished to sell the candy canes with the card, he could do so after school in the parking lot. Joel did not attempt to sell his ornaments with the cards in the parking lot. Instead, he sold the ornaments without the cards during the exercise.

Joel generously received a grade of "A" for his parents' efforts during the assignments and was not disciplined for attempting to sell the candy canes with the religious cards. The parties agree that Hensinger's actions were taken in her official capacity as principal of the school.

During the event itself, students had the "free choice" to buy the various products for sale at the fifty-six mock storefronts. Stipulated Facts at ¶ 9. Therefore, to obtain Joel's ornament, a student would have had to purchase the ornament during

the Classroom City event. Parents and non-students were encouraged not to make purchases.

On June 16, 2004, the plaintiffs filed a five-count complaint pursuant to 42 U.S.C. § 1983 alleging violation of the First Amendment's freedom of speech guarantee (count one); violation of the First Amendment's Free Exercise Clause (count two); violation of the Establishment Clause (count three); violation of the Due Process Clause of the Fourteenth Amendment (count four); and violation of the Equal Protection Clause of the Fourteenth Amendment (count five). The plaintiffs seek monetary damages, injunctive relief, and attorneys fees. On January 28, 2005, the parties filed cross motions for summary judgment. The parties have submitted responses in opposition to the respective motions, and the Court heard oral argument on the motions on October 6, 2005. The matter is now ready for decision.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The parties have filed cross motions for summary judgment, and neither suggests that there are facts in dispute. Nonetheless, the Court must apply the well-recognized standards when deciding cross motions; "[t]he fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate." *Parks v. LaFace Records*,

329 F.3d 437, 444 (6th Cir.2003). Therefore, when this Court considers cross motions for summary judgment, it "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir.2003).

A motion for summary judgment under Fed.R.Civ.P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When the " 'record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,' " there is no genuine issue of material fact. *Simmons-Harris v. Zelman*, 234 F.3d 945, 951 (6th Cir.2000) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Because motions were filed by and against both defendants, and the bases of liability are not identical for the two defendants, the Court will examine the evidence as it applies to each one separately.

A. School District's liability

To establish a claim under 42 U.S.C. § 1983, the plaintiff must satisfy two elements: (1) that there was a deprivation of a right secured by the Constitution and (2) that the deprivation was caused

by a person acting under of color of state law. *Wittstock v. Mark A. Van Sile, Inc.* 330 F.3d 899, 902 (6th Cir.2003). Municipalities are considered "persons" within the meaning of section 1983; however, a city "cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, a plaintiff asserting a section 1983 claim against a municipality such as a school board "must show that the School Board itself is the wrongdoer." *Doe v. Claiborne Cnty.*, 103 F.3d 495, 507 (6th Cir.1996) (citations omitted). Therefore, to succeed on their claims against the school district, the plaintiffs "must demonstrate both: (1) the deprivation of a constitutional right, and (2) the School District is responsible for that violation." *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir.2006) (citing *Claiborne Cnty.*, 103 F.3d at 505-06).

Among the ways a municipality, such as a school board, can be found to have violated constitutional rights itself under section 1983 are: (1) legislative action by the municipality's legislative body; (2) actions of municipal agencies or boards that exercise authority (such as a board of education), *see Monell*, 436 U.S. at 694, 98 S.Ct. 2018; (3) actions by individuals with final decision-making authority for a municipality, *see Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (holding that "those officials ... who speak with final policymaking authority for the local governmental actor" can render the municipality

itself liable); (4) a municipal policy of inadequate training or supervision, *see City of Canton v. Harris*, 489 U.S. 378, 383, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); and (5) a municipal custom, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 n. 10, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (observing that a municipality " 'may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels' ") (quoting *Monell*, 436 U.S. at 690-91, 98 S.Ct. 2018). The plaintiffs do not claim that the school district can be found liable under any of these theories except its alleged failure to train the teachers and principal on dealing with religious issues that might arise during the instructional day.

"To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis*, 455 F.3d at 700 (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir.1992)). In this case, the parties do not dispute the fact that the school district has not provided specific training on how to accommodate religious speech. Ms. Sweebe, who supervised the Classroom City project, acknowledged in her deposition that she has received no such training, and Ms. Hensinger, the principal, confirmed that there is no written policy on the subject. Taking the evidence in the light most favorable to the plaintiff, the Court

concludes that the first element of the failure-to-train claim is satisfied.

The Court believes, however, that the plaintiffs have not brought forth any evidence that the school district was deliberately indifferent to the issue or that the training shortcoming was a result of indifference on the part of the district. In City of Canton, the Supreme Court recognized two fact patterns by which a citizen could establish deliberate indifference. That case involved the training of police officers. The Court first observed that the nature of the officers' duties could be such that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need" in not providing training. *City of Canton*, 489 U.S. at 390, 109 S.Ct. 1197. The Court identified the need to apprehend fleeing felons and the possession of firearms by officers who might be called upon to use deadly force as indicating to a "moral certainty" that proper training would be required. *Id.* at n. 10. Second, municipal employees may have violated constitutional rights so often that the need for further training must have been "plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Ibid*; *see also id.* at 397, 109 S.Ct. 1197 (O'Connor, J., concurring) (finding that such behavior constitutes "tacit authorization" of the officers' conduct). The Sixth Circuit regularly applies these factors to failure-to-train claims. *See Ellis*, 455 F.3d at 700-02; *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999).

The plaintiffs in this case have presented no evidence that there has been a series of violations of religious rights at the school or that the school board knew or should have known that they should train teachers in that area. In fact, there is no evidence that there ever has been an incident of this type in the school district. In *Ellis*, the court of appeals rejected an argument that ten prior incident reports of teacher abuse established deliberate indifference to the need to furnish training on the subject. *Ellis*, 455 F.3d at 701. In *Thomas v. City of Chattanooga*, 398 F.3d 426, 430-31 (6th Cir.2005), the court held that evidence of forty-five lawsuits alleging excessive force against the Chattanooga Police Department did not establish deliberate indifference by that department. This Court cannot conclude in the absence of any prior incident of religious confrontation that a jury could find that the need to offer training in the area was "plainly obvious to [district] policymakers," or the failure to train could be ascribed to their deliberate indifference to that need. *City of Canton*, 489 U.S. at 390 n. 10, 109 S.Ct. 1197.

Nor have the plaintiffs presented any evidence that the need for training was so obvious that the failure to train would result in a constitutional violation. There is no evidence from which the Court or a jury could conclude that it was inherently foreseeable that teachers would violate the speech or religious rights of students or that specific training was necessary to avoid the deprivation of constitutional rights. Although the absence of prior complaints addresses a different aspect of the failure-to-train proofs, that fact also has a bearing on

the inherent foreseeability of the issues that might arise in the classroom. The point, of course, is that the lack of prior incidents reinforces the conclusion that a reasonable administrator cannot be found to have been deliberately indifferent to the need to train for unlikely happenings. Although a training program of the type the plaintiffs advocate may help school administrators in their tasks, there is no basis for school board liability based on the sole fact that no training existed.

The plaintiffs have not brought forth any evidence supporting municipal liability under section 1983. Therefore, the school district's motion for summary judgment will be granted and the plaintiffs' motion for summary judgment against this defendant will be denied.

B. Liability of individual defendant-qualified immunity

Defendant Irene Hensinger contends that she is entitled to qualified immunity in this case. Qualified immunity is an affirmative defense that protects government actors performing discretionary functions from liability for civil damages when their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court has held that a claim of qualified immunity must be examined in two steps: "[f]irst, a court must consider whether the facts, viewed in the light most favorable to the plaintiff, 'show the officer's conduct violated a constitutional right,' " and "the court must then

decide 'whether the right was clearly established.' " *Solomon v. Auburn Hills Police Dept.*, 389 F.3d 167, 172 (6th Cir.2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

The Sixth Circuit has expanded that inquiry into a three-step sequential analysis, stating: "The first inquiry is whether the [p]laintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is 'whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights.' " *Tucker v. City of Richmond, Ky.*, 388 F.3d 216, 219 (6th Cir.2004) (quoting *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir.2002)); see also *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir.2004) (citing *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003)). That court later explained that although the Supreme Court continues to use the two-step approach, *see Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam), " 'the three-step approach may in some cases increase the clarity of the proper analysis.' " *Swiecicki v. Delgado*, 463 F.3d 489, (6th Cir.2006) (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 311 n. 2 (6th Cir.2005)). It appears that when the state actor's conduct is obviously "objectively unreasonable" and violates a constitutional right, the court will "collapse" the last two steps. *Ibid.*

(quoting *Caudill v. Hollan*, 431 F.3d 900, 911 n. 10 (6th Cir.2005)). Where a more exacting analysis of the facts may be necessary, the court tends to employ the third step, since "[i]t is important to emphasize that [the step-two] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198, 125 S.Ct. 596 (internal quotes and citation omitted). However, because the defendant raised the qualified immunity defense, the burden is on the plaintiffs to prove that defendant Hensinger is not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir.2006) (holding that "[o]nce the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity").

1. Constitutional right

In their complaint, the plaintiffs allege that Joel Curry's constitutional rights to free speech, the free exercise of religion, due process, and equal protection were violated. However, during oral argument on the motion, the plaintiffs' attorney acknowledged that the main thrust of the case was the alleged violation of the boy's First Amendment speech rights.

a. Speech

"Ever since the Supreme Court decided *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the notion that students do not 'shed their constitutional rights to freedom of expression at the schoolhouse gate' is beyond debate." *Smith ex rel.*

Smith v. Mt. Pleasant Pub. Sch., 285 F.Supp.2d 987, 993 (E.D.Mich.2003). However, a student's right to speak out on public or private matters is subject to limitations. School administrators have the right, and perhaps the obligation, to prohibit speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," or that "would substantially interfere with the work of the school or impinge upon the rights of other students," *Tinker*, 393 U.S. at 509, 89 S.Ct. 733 (internal quotes and citation omitted). The First Amendment rights of students in school are not as broad as those of adults expressing themselves in public. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (noting that "[i]t does not follow ... that simply because the use on an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school").

The latitude that the Constitution gives school administrators to regulate student speech has depended in large measure on the context in which the speech is made. Supreme Court and Sixth Circuit precedent has established three general frameworks for analyzing student speech at school. First, when "a student's personal expression ... [merely] happens to occur on the school premises," *Hazelwood*, 484 U.S. 260, 271, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the speech is analyzed under *Tinker* and may only be censored if it would "materially and substantially interfere with the requirements of appropriate discipline in the

operation of the school." *Tinker*, 393 U.S. at 509, 89 S.Ct. 733 (citation and internal quotation marks omitted). Second, a student's speech that occurs when the school opens up a limited public forum for free expression by students is subject to more restrictions. *See, e.g., Kincaid v. Gibson*, 236 F.3d 342, 347-49 (6th Cir.2001) (en banc) (describing different types of fora generally, and holding that college yearbook was limited public forum). In such a forum, content-based restrictions are allowed, but they must be "narrowly drawn to serve a compelling interest." *Id.* at 348. Third, student speech that occurs when the school creates, under its auspices, the mechanism for student expressive activities such as school plays and publications where the school retains editorial oversight is subject to the most comprehensive restrictions. *Hazelwood*, 484 U.S. at 272-73, 108 S.Ct. 562. In this context, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. The principle that emerges from these cases is that the more likely it is that student speech will be attributed to the school itself, the more control over the content of the speech will be tolerated.

The parties do not agree on which approach ought to be applied in this case. The plaintiffs maintain that the Court ought to apply the more liberal pronouncement of *Tinker*, and the defendants insist that the more restrictive regulation of *Hazelwood* is the appropriate standard because

Classroom City is a closed forum. Both arguments have merit. On one hand, the school did serve as the vehicle for the expressive activity and thereby could be considered to have created a closed forum: without Classroom City, an assignment managed by the school, the question of Joel's ornaments would not have arisen. On the other hand, the school could have created a limited public forum by practice. After all, Classroom City was designed to be a mock city that resembled a town's market place where free speech traditionally is allowed. Further, students were encouraged to be creative and come up with a unique product. The Court need not resolve that dispute, however, because the Court finds that the defendant's restriction of Joel Curry's speech cannot be justified even under *Hazelwood*'s more generous standards.

There is no dispute that the religious card attached to Joel's ornament constitutes speech and therefore implicates the First Amendment. The defendants argue that there can be no constitutional violation here because Joel received an "A" for his efforts and was never disciplined for selling the cards. The defendants cite no case law in support of this view, and they appear to ignore the fact that Joel was not allowed to sell his ornaments with the card attached to them. Therefore, the constitutional deprivation for the purpose of the section 1983 claim was not discipline or Joel's grade, but rather the suppression of speech itself.

The defendants next observe, correctly, that under *Hazelwood*, a school may restrict expressive activities as long as its reasons are reasonably related to pedagogical concerns. They advance three

such concerns: (1) ensuring that the participants learn the lesson the activity is required to teach; (2) eliminating the threat of disruption; and (3) ensuring students views are not mistakenly attributed to the school, which might result in a violation by the school of the Establishment Clause. None of those concerns are sufficient to permit suppression of the speech in this case.

As for the first concern, the avowed purpose of Classroom City was to teach "literature, marketing, government, civics, economics and math." Stipulated Facts at ¶ 2. The Sixth Circuit has found the restriction of speech to be appropriate in instances where the child ignored the assignment in favor of religion or something else. *See Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir.1995) (holding that the First Amendment was not violated when student was not allowed to write research paper on the life of Jesus Christ where student did not receive permission to change her topic from a paper on drama, did not use the requisite number of sources, and topic was contrary to assignment's purpose of developing research skills by having students write on unfamiliar issues); *Denooyer v. Merinelli*, No. 92-2080, 1993 WL 477030, at *2 (6th Cir. Nov.18, 1993) (per curiam) (holding that the First Amendment was not violated when a student was not allowed to show videotaped performance where assignment required a live classroom presentation in order to increase students' verbal communication skills). However, the defendants do not contend that happened here.

Students were permitted to create any product they chose within the limitations of the assignment.

The lessons Classroom City was designed to teach presumably included economics, marketing, civics, and entrepreneurialism. Standing alone, the candy canes with a religious card attached met those ostensible goals. Joel came up with a product; he had to market it, sell it, and learn the strategies involved in those pursuits. There is no evidence that a religious message impeded those goals. In fact, a religious theme might be viewed as filling a market niche. Joel would not be the first to discover the commercial allure that religion has brought to capitalism. It appears that he learned that lesson well by ascribing a religious-albeit unoriginal and inaccurate-aura to an historically secular object to enhance its marketability. The school made the choice not to limit the products that students could make outside of a few established guidelines. The exercise and its objectives did not preclude incorporating religion. There is no evidence that a child's use of a religious products would prevent other students from learning what the assignment was designed to teach. The concern that the religious message on Joel's product would interfere with the pedagogical exercise is not a legitimate basis on which to restrict his speech.

Next, if the principal's pedagogical concern was disruption, then that defendant has provided no real evidentiary basis for any such concern. Joel's partner stated that no one wanted to learn about Jesus and chose on that basis to sell a different product during Classroom City. The insistence of Joel and his parents that the card be attached to the candy canes perhaps was insensitive and intolerant of the diverse cultural background of Joel's partner;

and it upset the arrangement the two boys made by requiring Siddarth to make his own product after he already had constructed the storefront (his half of the assignment). But this did not cause a disruption in the common sense of the word, nor is there any other evidence of disruption. There is no deposition testimony, for example, that in the past the school has had problems with religious-related materials during the event and that allowing the sale of products bearing a religious imprint gave rise to disruption. *Compare Melton v. Young*, 465 F.2d 1332, 1335 (6th Cir.1972) (upholding a ban on the wearing of clothing depicting the Confederate flag based on *Tinker's* rationale upon on a finding that the display of that flag could cause disruption and racial unrest in a newly-integrated high school), with *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 540 (6th Cir.2001) (reversing summary judgment for school board and holding that a ban on wearing clothing displaying the same symbol, which the plaintiffs wore ostensibly to express their "southern heritage," must be analyzed under the rules set forth in *Tinker* as to when public schools may regulate speech). It is undisputed that classmates and the student body were free to purchase products from any of fifty-six different storefronts and that they were also free not to buy products at all. On this record, the defendants have cited no more than an "undifferentiated fear or apprehension of disturbance [, which] is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508, 89 S.Ct. 733.

The defendant's third concern-fear of an Establishment Clause violation-presents a closer

question. The Establishment Clause of the First Amendment provides that a state "shall make no law respecting an establishment of religion." U.S. Const. amend. I. Just last term, the Supreme Court reiterated the purposes underlying the Establishment Clause:

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, ____ 125 S.Ct. 2722, 2733, 162 L.Ed.2d 729 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)). It is well settled that if the government engages in conduct, the "ostensible" and "predominant" purpose of which is to "advan[ce] religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ... object is to take sides." *Ibid.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987)).

When the State demonstrates "a purpose to favor one faith over another, or adherence to religion generally, [it] clashes with the understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *Ibid.* (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 718, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002)) (internal quotation marks omitted). Moreover,

government conduct that seems to favor religion "sends the ... message to ... nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.") *Ibid.* (quoting *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (internal quotation marks omitted).

The defendant in this case insists that she was obliged to censor Joel's religious speech because it was part of an assignment in which the content would be exposed to other students and parents, and the school was required to take pains to avoid the appearance of endorsing the religious sentiments of the product. This tension between the free expression rights of an individual and the Establishment Clause obligations of a state authority was discussed in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), where the Supreme Court observed that "[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech and Free Exercise Clauses protect." *Id.* at 765, 115 S.Ct. 2440 (internal citation and quotation marks omitted). As the Court explained, "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publically announced and open to all on equal terms." *Id.* at 770, 115 S.Ct. 2440.

That religious views are private and thus constitutionally protected, however, does not guarantee them a "forum on all property owned by the State." *Id.* at 761, 115 S.Ct. 2440. That is, private religious views that otherwise are constitutionally protected under the First Amendment's free expression provisions or Free Exercise Clause may find Establishment Clause rebuke when the State provides the vehicle for their expression and the forum is not one traditionally open. *Ibid.* Under those circumstances, private religious views may become the State's.

The reason the question is close in this case is that reasonable people could view the nature of the forum-the Classroom City environment-in different ways. To the extent that forum is open, the danger of attributing private religious views to the State is minimal. The danger, however, increases where the forum is closed. And all of this must be considered in light "of the fact that [the Supreme Court] ha[s] been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Van Orden v. Perry*, 545 U.S. 677, ____ 125 S.Ct. 2854, 2863-64, 162 L.Ed.2d 607 (2005) (internal citation and quotation marks omitted).

A school could be classified as a closed forum, and since the school retains control over the forum, religious expression might be attributable to the school as a state actor. For instance, in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), school principals invited clergy members from different faiths to deliver prayers at high school graduations. The Court found that the prayers would

be attributable to the school. *Id.* at 587, 112 S.Ct. 2649 ("A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State.... The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State."). At other times, a school may be viewed as a limited public forum, relaxing Establishment Clause concerns. *See Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). In *Good News Club*, a school was open after hours for "social, civic, and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Id.* at 102, 121 S.Ct. 2093. The *Good News Club*, a private organization for children age six to twelve, asked to hold its weekly after-school meetings in the school's cafeteria. *Id.* at 103, 121 S.Ct. 2093. Fearing an Establishment Clause violation, the school superintendent formally denied the request, comparing the proposed activities to religious worship. *Ibid.* The Court found those concerns unwarranted because the school had opened up a limited public forum to discuss a host of issues. *Id.* at 111-12, 121 S.Ct. 2093. As long as the Good News Club was willing to remain within the permissible scope of topics the forum was created to discuss, the school constitutionally could not exclude them. *Ibid.* The Court stated:

> [S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the

> Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

Id. at 112, 121 S.Ct. 2093.

The validity of State censorship of private religious speech based on concerns of an Establishment Clause violation, therefore, turns on whether the private speech can be attributed to the State, that is, whether the State appears to have endorsed a religious message. The Supreme Court has not offered a single, consistently-applied test that lower courts might apply to assist in making such determinations. Last term, the Supreme Court acknowledged, "Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 [1971], as providing the governing test in Establishment Clause challenges." *Van Orden*, 545 U.S. at ___, 125 S.Ct. at 2860-61 (emphasis added). The Court then discarded the test in that case-dealing with a display of the Ten Commandments on public property-as "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.* at 2861.

In this Circuit, however, the preeminent test to apply in Establishment Clause cases remains the one announced in *Lemon*. *See Adland v. Russ*, 307 F.3d 471, 479 (6th Cir.2002) ("While we have recognized that individual Supreme Court justices have expressed reservations regarding the *Lemon* test, see *American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 & n. 15 (6th Cir.2001) (collecting opinions),

we are an intermediate federal court and are bound to follow this test until the Supreme Court explicitly overrules or abandons it."). The *Lemon* test requires the court to consider whether (1) the government activity in question has a secular purpose, (2) the activity's primary effect advances or inhibits religion, and (3) the government activity fosters an "excessive entanglement" with religion. *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105. The Sixth Circuit has acknowledged that the Supreme Court occasionally has articulated what has come to be known as the "endorsement test," but this test has never been considered as replacing the three-pronged analysis prescribed by *Lemon*: "While we have variously interpreted the endorsement test as a refinement or modification of the first and second prongs, a clarification of the first prong, and as a modification of the entire *Lemon* test, we follow our en banc decision in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir.1992), and the recent panel decisions in *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir.2000), cert. denied, 531 U.S. 1152, 121 S.Ct. 1097, 148 L.Ed.2d 970 (2001), and *Granzeier [v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999)], and treat the endorsement test as a refinement of the second *Lemon* prong." *Adland*, 307 F.3d at 479 (citations omitted). Justice O'Connor made the point in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), writing in her concurring opinion:

> Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the

> *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1960) (mandatory Sunday closing law), and in *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community

Id. at 691-92, 104 S.Ct. 1355 (O'Connor, J., concurring).

The Court concludes, therefore, that the validity of the defendant's Establishment Clause concern in this case must be measured against the second prong of the *Lemon* test as refined by the endorsement test, which asks "whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government." *Adland*, 307 F.3d at 479. Put another

way, the question is whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (opinion of Blackmun, J.) (internal citation and quotation marks omitted).

Based on the undisputed facts, the Court finds that no reasonable observer would attribute to the school the religious message on the card attached to the candy cane ornament. It is true that Joel's product had to be approved based on a prototype submitted during the marketing survey portion of the assignment, and Ms. Sweebe had the authority to allow or disallow products that did not meet the project's criteria. However, it is undisputed that at the time of the market survey, Joel had not yet attached the religious cards. Moreover, Classroom City should be viewed by the reasonable observer as creating a limited public forum, since the exercise was designed to be a mock city where different products and viewpoints converge on the streets and in commerce. A product bearing a religious card certainly would be allowed in a city's marketplace.

In addition, Classroom City ostensibly was designed for a secular purpose: it takes a multidisciplinary approach to learning by incorporating lessons on literature, marketing, government, civics, economics, and mathematics. The mock city included some fifty-six storefronts. It cannot be argued reasonably that allowing the sale

of ornaments had the primary effect of advancing religion. Any effect of the sale of the cards was minimal at best. Students from other grades were free to tour the mock city as they wished and were not required to purchase any products from any storefront. Nor were students encouraged to purchase any particular product.

Allowing the sale of the card along with the ornament would not have been perceived by a casual observer as an endorsement of a religious message by the school. The Court finds that the defendant's concern over an Establishment Clause violation was not a valid reason to curtail Joel Curry's speech rights. Therefore, the plaintiffs have established a violation of a constitutional right under the First Amendment's free speech protection.

b. Free Exercise Clause

The plaintiffs also argued in their pleadings that the defendant's actions inhibited the student's free exercise of his religion. However, at oral argument, the plaintiffs agreed that the free exercise claim was subsumed in the free expression claim. The Court agrees that analyzing the claim as a free speech case is more appropriate. There was no compulsion by the school concerning any particular form of religious belief, nor was there any penalty or burden imposed on the plaintiffs for performing or refusing to perform an act that they believed was violative of their religious convictions. "[The] purpose [of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the

coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *see also Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir.1987) (stating that "[i]t is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause"). The plaintiffs have not proved a violation of the Free Exercise Clause.

c. Equal Protection Clause

The plaintiffs also de-emphasized their equal protection claim at oral argument. They have pointed to no law, regulation, statute, ordinance, or regulation that was applied unequally to Joel Curry in this case. Given the finding that the plaintiffs' free speech rights under the First Amendment were violated, the Court need not address the Equal Protection claim.

d. Due process

The plaintiffs have argued that the defendant's decision to prohibit the sale of the religious card violated the Due Process Clause because it was based on vague standards and was not taken pursuant to any written policy or regulation. The Sixth Circuit has explained the doctrine of vagueness as follows:

> "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)

> (holding that Rockford's antinoise ordinance was not unconstitutionally vague). Vague laws are problematic because they (1) "may trap the innocent by not providing fair warning," (2) fail to "provide explicit standards for those who apply them," and (3) threaten "to inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-09, 92 S.Ct. 2294 (quotation marks and footnote omitted). A law must therefore "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108, 92 S.Ct. 2294.
>
> The Supreme Court has explained that, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.* at 110, 92 S.Ct. 2294.

Deja Vu of Cincinnati L.L.C. v. Union Tp. Bd. of Trustees, 411 F.3d 777, 798 (6th Cir.2005).

The crux of the plaintiffs' claim here is that there is some affirmative duty on the school district's part to make a written policy on class assignments and religious content. The plaintiffs, however, cite to no authority in support of this novel proposition. Moreover, the Supreme Court has rejected a notion that a school must act pursuant to a written policy when it deals with constitutional issues likely to arise in a school environment. See *Hazelwood*, 484 U.S. at 273 n. 6, 108 S.Ct. 562. ("We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to

specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."). The Court concludes, therefore, that the plaintiffs have not proved a violation of constitutional rights based on the Due Process Clause.

2. Whether right is clearly established

Having determined that the plaintiffs have proven a violation of Joel Curry's free speech rights, the Court next must determine whether the rights were clearly established at the time "such that a reasonable official would have understood that [her] behavior violated that right"; and whether the plaintiffs have offered sufficient evidence "to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights." *Tucker*, 388 F.3d at 219. In this case, the right to be free to speak on ideas and beliefs in a school setting is clearly established. But the qualified immunity defense requires the Court to look beyond the right in the abstract. The Supreme Court has acknowledged that "[i]t is sometimes difficult for [a public official] to determine how the relevant legal doctrine ... will apply to the factual situation the [official] confronts." *Saucier*, 533 U.S. at 205, 121 S.Ct. 2151. Qualified immunity protects municipal personnel who must operate along the "hazy border" that divides acceptable from unreasonable conduct. *Id.* at 206, 121 S.Ct. 2151.

Although the Sixth Circuit has not directly addressed qualified immunity in First Amendment school cases, it has found the defense to be available

where constitutional precedent has not been a model of clarity. *See Sallier v. Brooks*, 343 F.3d 868 (6th Cir.2003). The Fifth Circuit has held that a school administrator was entitled to qualified immunity despite a finding of a First Amendment speech violation because of "the unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others." *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 620 (5th Cir.2004).

In this case, the Court finds that the First Amendment speech rights of a student to make religious statements in a quasi-classroom setting were not clearly established at the time of the incident. As noted earlier, the Supreme Court has articulated at least three different tests to be applied to speech restrictions in the academic arena. The nature of Classroom City defies an easy categorization as to the type of forum it created, and therefore the school administrator reasonably could not be expected to identify the subtle distinctions that differentiate one type of forum that resulted or the appropriate test that should be applied.

The plaintiffs argue that the state of the law is clear and that the principal here was simply ignorant of the law. The third step of the inquiry, however, requires that the plaintiff offer sufficient evidence "to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers*, 319 F.3d at 848 (internal citation and quotation marks omitted). The plaintiffs simply have made conclusory allegations that the law, as they see it, is clearly established. In so doing, the plaintiffs fail to

point to evidence suggesting the objective unreasonableness of the principal's actions.

Rather, the Court finds that the principal did not act unreasonably when she prohibited Joel from selling the ornaments with the religious cards attached. There is evidence that the principal has received a law degree, but that fact may serve to complicate the matter. Ms. Hensinger had to make a difficult choice in a complicated situation. That she was expected to apply several constitutional tests to determine the correct legal answer would be daunting even in an ideal situation. Her knowledge of the law no doubt sensitized her to her obligations under the Establishment Clause, which under some circumstances may serve as a compelling government interest and therefore constitutionally justify a free speech violation. *See Widmar v. Vincent*, 454 U.S. 263, 271 , 102 S.Ct. 269, 70 L.Ed.2d 440(1981) ("We agree that the interest of the University in complying with its constitutional obligations [under the Establishment Clause] may be characterized as compelling."). According to the stipulated facts, Ms. Hensinger first sought advice from the school superintendent, and only then did she finalize her decision to disallow the religious cards. Thereafter, Joel was told that he could distribute the cards after school in the parking lot. Balancing obligations under the Establishment Clause and the free speech provisions of the First Amendment in this case placed the defendant squarely upon the "hazy border" that divides acceptable from unreasonable conduct. *Saucier*, 533 U.S. at 206, 121 S.Ct. 2151. This appears to the

Court to be precisely the type of case for which the qualified immunity defense was intended.

C. Injunctive relief

In their complaint, the plaintiffs requested that the Court "issue [p]reliminary and [p]ermanent [i]njunctions enjoining [d]efendants ... from violating Joel's constitutional rights by banning religious expression that otherwise fulfills classroom assignments." Compl. at 14. The plaintiffs also requested declaratory relief. Although the Court finds that defendant Hensinger is entitled to qualified immunity, that defense shields her from damages only, not from declaratory or injunctive relief. *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir.2001) (stating that "qualified immunity protects officials from individual liability for money damages but not from declaratory or injunctive relief"); *Littlejohn v. Rose*, 768 F.2d 765, 772 (6th Cir.1985).

The Court finds, however, that the request for declaratory and injunctive relief is moot because Joel matriculated out of the Hadley Middle School in 2004 (he was a fifth grader in December 2003 when he participated in the Classroom City project) and the injunction he seeks could provide no meaningful relief. In *Sandison v. Michigan High School Athletic Association, Inc.*, 64 F.3d 1026 (6th Cir.1995), the court considered an appeal of a preliminary injunction in favor of high school track competitors challenging the application of eligibility rules to them. The court determined that the issue was moot, reasoning:

> The 1995 track season has ended, and thus the plaintiffs will have no more races to run.

> The "capable of repetition yet evading review" exception to mootness does not apply to these plaintiffs because the exception requires not only that the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, but also that there was a reasonable expectation that the same complaining party would be subjected to the same action again.... At oral argument, we learned that Sandison and Stanley graduated from high school in June 1995, which precludes the repetition of another controversy over whether these same plaintiffs may run on their high school teams.

Id. at 1029-30 (internal citations and quotation marks omitted). *See also Hooban v. Boling*, 503 F.2d 648, 650 n. 1 (6th Cir.1974) (holding that request for injunctive relief in civil rights action by law student alleging that his classification by university as an out-of-state student for tuition purposes violated equal protection clause and his right to travel was moot because the law student had graduated from law school).

Other courts have held that in similar circumstances, a damage claim will save the lawsuit itself from a mootness challenge, but injunctive relief may not be awarded. *See Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir.2004) (injunctive relief could no longer redress the injury and the "capable of repetition, yet evading review" doctrine did not apply, but plaintiff's nominal damages claim saved action from mootness); *Mellen v. Bunting*, 327 F.3d

355, 364-65 (4th Cir.2003) (plaintiffs' claim for injunctive relief arising from challenge to constitutionality of supper prayer at Virginia Military Institute became moot upon the plaintiffs' graduation but the damages claim continued to present a live controversy); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir.2003) (although a student's First Amendment claims for injunctive and declaratory relief became moot upon her graduation, her damages claim continued to present a live controversy); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir.1999) (en banc) ("A student's graduation moots claims for declaratory and injunctive relief, but it does not moot claims for monetary damages.").

The precedents require, therefore, that the Court deny the plaintiffs' request for declaratory and injunctive relief as moot.

III.

The Court finds that the undisputed facts demonstrate that the plaintiffs may not recover against the Saginaw School District on their failure-to-train theory. Although the plaintiffs have shown that the individual defendant engaged in conduct that violated plaintiff Joel Curry's speech rights under the First Amendment, the individual defendant is entitled to qualified immunity as a matter of law. The requests for declaratory and injunctive relief are moot.

Accordingly, it is **ORDERED** that the plaintiffs' motion for summary judgment [dkt # 25] is **DENIED** and the defendants' motion for summary judgment [dkt # 22] is **GRANTED**.

It is further **ORDERED** that the complaint is **DISMISSED WITH PREJUDICE**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: September 18, 2006

APPENDIX C

No. 06-2439

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOEL CURRY, ET AL., Plaintiffs-Appellants,	) Filed May 13, 2008
v.	)
CITY OF SAGINAW, ET AL., Defendants-Appellees.	) ORDER

BEFORE: NORRIS, GIBBONS, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Leonard Green
Clerk

APPENDIX D

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1

APPENDIX E

Excerpts from U.S. Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* 68 Fed. Reg. 9645 (Feb. 28, 2003)

Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency ("LEA") must certify in writing to its State educational agency ("SEA") that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

* * * As required by the Act, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law.

* * *

The General Education Provisions Act ("GEPA") authorizes the Secretary to bring enforcement actions against recipients of Federal education funds that are not in compliance with the law. Such measures may include withholding funds until the recipient comes into compliance.

Section 9524 provides the Secretary with specific authority to issue and enforce orders with respect to an LEA that fails to provide the required certification to its SEA or files the certification in bad faith.

68 Fed. Reg. at 9646

Although the Constitution forbids public school officials from directing or favoring prayer, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and the Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Moreover, not all religious speech that takes place in the public schools or at school-sponsored events is governmental speech. For example, "nothing in the Constitution * * * prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday," and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Likewise, local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their

expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the state and therefore may not be restricted because of its religious content. Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience. As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated," and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.

68 Fed. Reg. at 9647 (footnote numerals omitted).

Religious Expression and Prayer in Class Assignments

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

68 Fed. Reg. at 9647.

No. 08-190

Court, U.S.
FILED
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IN THE

Supreme Court of the United States

JOEL CURRY, a minor by and through his parents PAUL & MELANIE CURRY,

Petitioners,

v.

IRENE HENSINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Joel Curry created a candy cane with an explicitly religious proselytizing message belatedly attached to it after its approval for selling as a home-made product in a simulated marketplace open to all elementary school students at Handley School. The school principal declined to allow the student to attach the religious proselytizing message to the candy cane.

1. Did the Sixth Circuit err by holding that a public elementary school principal's determination that a student could not engage in unsolicited religious proselytizing speech as part of a graded classroom assignment during instructional time was reasonably related to legitimate pedagogical concerns and therefore not violative of the First Amendment?

2. Did the Sixth Circuit err by holding that a student's unsolicited religious proselytizing speech engaged in as part of a graded classroom assignment during instructional time is subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)?

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STATEMENT

Joel Curry, a minor through his parents, Paul and Melanie Curry, (hereinafter "the Student" or "Curry") sued the School District of the City of Saginaw and its then-principal, Irene Hensinger (hereinafter "the Principal") claiming that his rights under the First Amendment had been violated. (R. 1 Complaint). Curry complained the school district and its principal had unconstitutionally impeded his religious speech by preventing him from attaching a religious proselytizing message to candy canes that had been pre-approved for sale without the message in a simulated marketplace created for elementary students as part of a school curriculum graded assignment. (*Id.*) Hensinger contended that Curry's constitutional rights had not been violated, and in any event, that she was protected by qualified immunity because her conduct did not violate established statutory or constitutional rights of which a reasonable person would have known. (R. 22, Motion for Summary Judgment by all Defendants). The district court ruled that Hensinger and the School District for the City of Saginaw had violated Curry's rights but that Hensinger was protected with qualified immunity because the law was not clearly established. Curry appealed. The Court of Appeals reversed the district court's finding of a constitutional violation and held that Hensinger's conduct was constitutionally permissible.

When filing their motion for summary judgment, defendants adopted the joint statement of stipulated facts submitted to the district court on January 14, 2005. (R.15 Stipulation, Joint Statement of Facts;

Apx. pg. 59). In addition, they relied upon facts submitted to the district court that same date along with the affidavit of Irene Hensinger. (R.18 Statement of Resolved and Unresolved Issues). Hensinger's affidavit is consistent with the stipulated facts. She explained her involvement as follows:

> For several years, the Fifth Grade curriculum at Handley School included an event called Classroom City. Classroom City is a multi-disciplinary project or unit which involves teaching of literature, marketing, civics, economics and math.
>
> On the first day of the Classroom City event in December of 2003, a teacher named Lisa Sweebe informed me that a student named Joel Curry was "selling" or distributing candy cane ornaments with a writing attached entitled, "The Meaning of the Candy Cane." I was given a copy of the writing. When I reviewed the writing, I found it to be overtly religious and proselytizing in nature.
>
> Shortly thereafter, the teacher provided me with a copy of some legal information from Mrs. Curry which appeared to have been printed off of the Internet. I reviewed the information. I did not find the information to be persuasive, because it did not focus upon events occurring during instructional time.

I forwarded both the note with the writing, "The Meaning of the Candy Cane" and the Internet information to my supervisor, Dr. John Norwood, Assistant Superintendent for School Performance. Shortly thereafter, I discussed the situation with Dr. Norwood.

Ultimately, I decided, with input from Dr. Norwood, that the student, Joel Curry, would not be allowed to distribute the writing, "The Meaning of the Candy Cane" with the candy cane ornaments he was "selling" at Classroom City. In making this decision, I was concerned about offending other students and parents, actual and potential disruption of the educational environment, and avoiding a possible violation of the Establishment Clause.

I do not recall the "selling" or distributing of overtly religious materials to have been in issue at Handley School prior to the December 2003 Classroom City event.

In deciding not to allow the writing, "The Meaning of the Candy Cane" to be distributed by Joel Curry at the December 2003 Classroom City event, I was not referring to or relying upon any written or unwritten policy or custom or practice of the school district. I am not aware of any policy or custom or practice of the school district relating to the distribution of overtly religious materials. However, as a lawyer and a Principal, I was very aware of the doctrine of separation of church and state and wanted to avoid a violation of the Establishment Clause.

> I met with Mrs. Curry to discuss my decision during the Classroom City event. When I explained to her that the Classroom City event was instructional time, she seemed surprised.
>
> Later, in April of 2004, I met again to discuss this issue with Mr. and Mrs. Curry, and a private attorney retained by the school district, Mr. B.J. Humphreys. Mr. Humphrey's statements at the meeting supported my decision that the distribution of the writing, "The Meaning of the Candy Cane" was not appropriate during instructional time.
>
> To the best of my knowledge and information, the issue of the distribution of the writing, "The Meaning of the Candy Cane" with the candy cane ornaments at Classroom City was never brought to the attention of either the Superintendent of Schools or the Board of Education prior to the filing of the Complaint in this case.

Joel Curry filed a complaint as a civil rights action under 42 U.S.C. § 1983 seeking to enjoin the defendants' purported policy and practice of discrimination against students who use religious contents when responding to a class assignment. (R.1 Complaint, ¶1; Apx. pg. 9). Curry alleged that he was prohibited from "selling" candy cane ornaments with an attached message explaining the religious origin of the candy cane as part of a "Classroom City" simulation designed to teach students in his class how to be

contributing citizens of a town by participating in its marketplace. (*Id.*) In addition, he maintained that defendants violated his right to freedom of speech by censoring his candy cane ornament with its attached religious message and that defendants violated the free exercise and establishment clauses of the First Amendment as well as his rights to due process and equal protection of the law under the Fourteenth Amendment.

Arguing that the Student was unable to demonstrate a constitutional violation and that she was cloaked with qualified immunity, the Principal moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). (R.22 Motion for Summary Judgment by All Defendants). She contended that none of the actions complained of by the Student led to the violation of his constitutional rights and that, even if they did, she was entitled to qualified immunity where her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known (*Id.*)

Curry filed a cross motion for summary judgment (R.25 Cross Motion for Summary Judgment by All Plaintiffs). He challenged defendants' ability to present a specific showing of constitutionally valid reasons for the regulation of his speech. (*Id.*) Curry also urged that, in light of the jurisprudence affirming protection for proper religious expression, censorship of religious speech, simply because of its content, could not be a legitimate pedagogical concern as a matter of fixed constitutional principle. (*Id.*) In his brief in response to the defendants' motion for summary judgment, Curry disputed Hensinger's assertion of a qualified immunity defense (R.34 Brief in Support of Motion Opposing Defendants' Motion for Summary Judgment).

The district court denied Curry's cross motion for summary judgment and granted the defendants' motion for summary judgment (R.50 Memorandum, Opinion and Order; Apx. pg. 87). In so ruling, the district court found that the defendants did not violate Joel Curry's rights under the free exercise clause of the First Amendment; agreed that defendants abridged Joel Curry's First Amendment free speech rights; rejected Joel Curry's claim that the School District failed to train its personnel in dealing with such issues or otherwise establish municipal liability; and accepted Principal Irene Hensinger's argument that she was entitled to qualified immunity. (*Id.*)

The district court partly based its ruling on plaintiff's counsel's acknowledgment that the main thrust of the case was the alleged violation of First Amendment speech rights, not his other theories. (R.50 Memorandum Opinion and Order, pg. 13; Apx. pg. 99). The district court concluded that defendants' restriction of Joel Curry's speech could not be justified even under the more generous standard provided in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). (R.50 Memorandum Opinion and Order, pg. 15; Apx. pg. 101). The district court also ruled that the defendants' concern over an establishment clause violation was not a valid reason to curtail Joel Curry's speech rights. (R.50 Memorandum Opinion and Order, pg. 24; Apx. pg. 110). For these and other reasons, the district court held that Curry established a violation of constitutional rights under the First Amendment's free speech protection (*Id.*)

The district court held that the Student had not proved a violation of the free exercise clause (R.50 Memorandum Opinion and Order, pg. 25; Apx. pg. 111); had not demonstrated a violation of constitutional rights

based upon the due process clause (R.50 Memorandum Opinion and Order, pg. 26; Apx. pg. 112); and that the court need not address the equal protection claim given the finding that the Student's free speech rights under the First Amendment were violated (R.50 Memorandum Opinion and Order, pg. 25; Apx. pg. 111).

As for the availability of the qualified immunity defense for the Principal, the district court indicated that it was a question of whether the constitutional rights were clearly established. The district court found that they were not clearly established. Thus, the district court held that the Principal was entitled to successfully assert a qualified immunity defense:

> In this case, the Court finds that the First Amendment speech rights of a student to make religious statements in a quasi-classroom setting were not clearly established at the time of the incident. As noted earlier, the Supreme Court has articulated at least three different tests to be applied to speech restrictions in the academic arena. The nature of Classroom City defies an easy categorization as to the type or form it created, and therefore, the School administrator reasonably could not be expected to identify the subtle distinctions that differentiate one type of forum that resulted or the appropriate that should be applied.

(R.50 Memorandum Opinion and Order, pgs. 27-28; Apx. pgs. 113-114). Observing that this appeared to be precisely the type of case for which the qualified immunity defense was intended, the district court

rendered judgment in favor of defendants. (R.50 Memorandum Opinion and Order, pg. 29; Apx. pg. 115; R.51 Judgment; Apx. pg. 118).

Notably, the district court determined that the Student's request for declaratory and injunctive relief against the School District for the City of Saginaw was moot because Curry had graduated our of Hadley Middle School in 2004. (Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, Pet. Apx. Pg. 38b). The court determined that the Student's damage claim saved the lawsuit from the mootness challenge, but denied his request for declaratory and injunctive relief. *Id.* The district court then evaluated whether the Student could succeed with his money damage claim against the School District, and concluded that he could not because the law of 42 U.S.C. § 1983 required a showing of either an unconstitutional policy or practice on the school district's part, or a showing that the school district could be liable under a failure-to-train theory. *Id.* at 40b. The Student failed to raise a fact question regarding any of these grounds for imposing liability under 42 U.S.C. § 1983. The district court also rejected the Student's money damage claim against the Principal because she was entitled to qualified immunity. *Id.* at 40b.

The School District for the City of Saginaw did not pursue an appeal. The Student appealed from the judgment dismissing his claim against the Principal, and the sole issue raised on appeal was whether the district court erred in concluding that she was protected with qualified immunity. The Principal urged the Court of

Appeals to affirm the judgment, arguing that it could be supported by both prongs of the qualified immunity analysis: 1) that she did not violate Curry's constitutional rights; and 2) that no clearly established law would have told a reasonable person that the complained-of conduct was unconstitutional.

The court of appeals determined that the Student's speech was made as part of school activities and thus, the standard for restricting his speech was to be found in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Noting that the Student had evaded the formal approval process by submitting the candy canes without any religious attachment for the market survey and approval process, the court reasoned that the decision not to allow the attachment was based on the legitimate pedagogical concerns. The court recognized a number of such concerns including that allowing the card in that setting could offend other children and subject younger children to an unsolicited religious promotional message during classroom time. The court emphasized in its decision that schools have broad discretion to make such judgments regarding speech in a classroom instructional setting. Based on this, the court held that the Student's rights were not abridged. It therefore affirmed the district court's grant of summary judgment in favor of the Principal.

REASONS FOR DENYING THE PETITION

I. CURRY HAS NOT ESTABLISHED THAT THESE CONSTITUTIONAL ISSUES SHOULD BE REVIEWED BY THIS COURT.

Curry, an elementary school student, contends that this Court should grant review to consider whether the court of appeals correctly held that a school principal may exercise her discretion to prevent an elementary school student from engaging in unsolicited religious proselytizing speech as part of a classroom assignment during instructional time because her determination was reasonably related to legitimate pedagogical concerns. Curry also urges this Court to consider whether an elementary school principal's decision regarding whether to approve a student's unsolicited religious proselytizing speech engaged in as part of a classroom assignment during instructional time is subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Curry argues certiorari should be granted because the decision conflicts with this Court's decisions, allows discrimination against religious speech, and deviates from guidelines of the Department of Education on students' constitutional rights of religious speech. This case was correctly decided below and, in any event, is a poor candidate for review.

First, the case presents an issue of law that is not well developed in the circuit courts of appeals. The question of constitutionally permissible parameters for

school discretion regarding when to permit student religious proselytizing speech in the classroom setting should be allowed to percolate in the lower courts before this Court accepts a case for review. Second, Curry's petition for certiorari focuses on a claim of discrimination against religious speech (Petition for Writ of Certiorari, pgs. 15-17), which was not the focus of his argument on appeal and was not directly ruled on below. *Curry v Hensinger*, 513 F.3d 570, (6th Cir. 2008) ("On appeal, Plaintiff claims only a violation of the constitutional right to freedom of speech"). Third, the Court of Appeals decision is correct. Fourth, Curry's effort to suggest the Sixth Circuit decision conflicts with Department of Education guidelines ignores the unique circumstance that the speech at issue involved an unsolicited religious proselytizing message, which would be presented during classroom instructional time to early elementary school students after it had been reviewed and approved by the school. Fifth, Curry's argument that the Sixth Circuit applied the wrong standard in analyzing the speech at issue here cannot be reconciled with this Court's repeated emphasis on preserving discretion for local educational officials regarding speech in the classroom setting that the public "might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Sixth, even if Curry is correct about the legal standard and constitutional rule of law, the outcome here will be the same because the Principal would still be entitled to the protection of qualified immunity because the law governing speech in a classroom in these circumstances was not clearly established.

A. Contrary to Curry's argument, no conflict exists in the lower courts and the issues should be allowed to percolate before this Court intervenes to resolve them.

The constitutionality of a public elementary school principal's determination that a student may not engage in unsolicited religious proselytizing speech as part of a classroom assignment during instructional time is a novel and important issue of law. But the intermediate federal appellate courts and state appellate courts have not yet grappled with the issue sufficiently to allow this Court the benefit of their thinking. Absent time for the issue to percolate, this Court will be in the position of deciding the issue without the benefit of this process. Rather than point to conflicting decisions, Curry relies on a series of decisions involving speech made outside the context of graded classroom assignments to support his argument that the court of appeals erred. (Petition for Writ of Certiorari, pg. 10 citing *Capitol Share Review Advisory Bd. V. Pinette*, 505 U.S. 753 (1995) (involving question of unattended cross on grounds of state capital and not student conduct or speech in a school setting).

Curry cites some decisions in the school setting, but they involve public or limited public forums in a school outside the classroom setting. *See, e.g.*, (Petition for Writ of Certiorari, pgs. 22-23 citing *Morse v Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007) and *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. School Dist.*, 386 F.3d 514 (3rd Cir. 2004). Curry's approach underscores the absence of a conflict in the decisions of lower courts or of this Court. And while the parameters of appropriate school discretion in the context of the

classroom instructional setting arguably remains hazy, this stems from the fact-based analysis that this Court has historically applied and the distinctions between categories of speech regulation in schools, not from a conflict in the lower courts. The level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). *See also Boroff v. Van Wert City Board of Educ.*, 220 F.3d 465, 467-71 (6th Cir.2000) (analyzing the Supreme Court's decisions in *Tinker*, *Fraser*, and *Kuhlmeier*); *Henerey v. City of St. Charles*, 200 F.3d 1128, 1132 (8th Cir.1999) (comparing the level of scrutiny applied *Tinker* in and *Hazelwood*); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 527-29 (9th Cir.1992) (analyzing the distinctions between the Supreme Court's decisions in *Tinker*, *Fraser*, and *Kuhlmeier*). Compare *Curry v. Hensinger*, 315 F.3d 570 (6th Cir. 2008) with *M.A.L. v. Kinsland*, 2008 WL 4471097, 2008 U.S. App. LEXIS 21028, __ F.3d __ (6th Cir. 2008) and *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001). No conflict exists. In addition, this Court will benefit from allowing these issues to further percolate in the lower courts before it grapples with them.

B. Curry's claim of per se discrimination against religious speech was not the focus of his argument on appeal and was not directly ruled on below.

Curry's petition for a writ of certiorari alters the focus of his claim. The district court pointed out in its opinion that "during oral argument on the motion [for summary judgment], the plaintiffs' attorney acknowledged that the main thrust of the case was the alleged violation of the boy's First Amendment speech rights." (R.50 Memorandum Opinion and Order, pg. 13). The district court later announced that Curry's focus was not religious or viewpoint discrimination but free speech:

> The plaintiffs also de-emphasized their equal protection claim at oral argument. They have pointed to no law, regulation, statute, ordinance, or regulation that was applied unequally to Joel Curry in this case.

Id. at pg. 25. Not only was this discrimination claim de-emphasized, but the district court declined to rule on it:

> Given the finding that the plaintiffs' free speech rights under the First Amendment were violated, the Court need not address the Equal Protection claim.

Id. On appeal, Curry challenged the district court's determination that the Principal was protected with qualified immunity. *Curry v Hensinger*, 513 F.3d 570 (6th Cir. 2008). Curry did not appeal as to the school district

or challenge the district court's failure to decide his equal protection claim. Nor did Curry argue in the Sixth Circuit that the First Amendment bars the discriminatory exclusion of religious viewpoints as such. At best, Curry mentioned the word "discrimination" in passing in the course of discussing whether the decision not to allow the religious message served a pedagogical purpose. (Appellant's Brief, pgs. 23-26).

But in his petition for a writ of certiorari, Curry's focus has changed. He now urges review because it was error to "hold that a public elementary student's religious speech presented in response to, and in compliance with, a class assignment, may be categorized as *per se* 'offensive' because it is religious...." (Petition for a Writ of Certiorari, pg. i). And Curry's argument is squarely predicated on a claim of the "discriminatory exclusion of religious viewpoints as such." *Id.* at pgs. 15-19.

Not only is this argument newly raised, but it is inconsistent with a nuanced view of the facts. The parties stipulated to the fact that Curry was obligated to obtain approval for his product, and to engage in a market survey. At the time he did so, he failed to include the card with the religious message or alert the school that it had been added to the candy canes before their sale. *Curry v Hensinger*, 513 F.3d 570, 574-575 (6th Cir. 2008). Curry's *per se* discrimination argument is not well-developed since it was never presented below. This case is a poor candidate for review of that issue given the lack of developed appellate record, and the fact that Curry's proposed speech, the candy cane with the religious card, failed to meet the school's standards since he had not done a market survey with the religious card, but added it after-the-fact contrary to the requirements of the assignment.

C. Despite Curry's assertions to this Court, the court of appeals decision does not conflict with Department of Education guidelines and this argument was not presented or ruled on below.

Curry also argues that the court of appeals' decision conflicts with the standards of the U.S. Department of Education, as set forth in *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003). Curry reads the *Guidance* standards to bar use of pedagogical concerns to excuse "censorship" of students' religious speech. This argument misconstrues both the standards upon which Curry relies and their application to the facts of this case. The "Prayer During Noninstructional Time" standard provides that school authorities may not structure rules of order and pedagogical restrictions to discriminate against religious speech in noninstructional time.

> Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities. While school authorities may

> impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

Guidance, 68 Fed. Reg. at 9647. This standard embodies the constitutional requirement that student religious speech must be allowed to the same extent as other speech during recess, lunch hour, and other non-instructional time.

This non-instructional-time standard does not apply to this case. The Classroom City event where the religious card was presented was indisputably considered instructional time. (Affidavit of Irene Hensinger, ¶¶ 10-11). Thus, Curry is wrong that the court of appeals decision conflicts with the standard insofar as this one is concerned.

Curry also relies upon the "Religious Express and Prayer in Class Assignments," standard, which allows a student to be graded on legitimate pedagogical concerns identified by the school.

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school.

> Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

Guidance, 68 Fed. Reg. at 9647. To be sure, this standard comes closer to the facts of this case. But the standard encompasses the requirement that whether religious content is allowed must be judged "by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school." *Id.*

The court of appeals' opined that the Principal's decision to prevent the Student from attaching the cards to the candy canes was based on a valid pedagogical concern, namely, to avoid having its curricular event offend other children or their parents and to avoid subjecting young children to an unsolicited religious promotional message while they were essentially a captive audience participating in a classroom activity. Compare with *Santa Fe Ind. Sch. Dist. v. Jane Doe*, 540 U.S. 290, 302-304 (2000). This opinion notes a key factual difference between the factual posture of this case and that which the standard addresses – the Classroom City event was not simply a graded assignment. It was an instructional, curricular event that required the student's work to be exhibited and sold at a school sponsored marketplace to other students. This factual difference raises a pedagogical concern of exposing students, their parents, and other young children to an

unsolicited religious promotional message at a school-sponsored curricular event, potentially disrupting the educational environment. This Court has recognized the validity of these concerns in the context of expressing religious views in the classroom. See *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the Student and his or her family.").

Curry's reliance upon the *Guidance* standard as creating a conflict with a court of appeals opinion regarding unsolicited religious messages at a school sponsored event is, therefore, misplaced.

D. The court of appeals' decision is correct.

The court of appeals properly concluded that Principal Hensinger was entitled to qualified immunity because she did not violate petitioner's First Amendment rights under the *Hazelwood* standard, which applies to speech by a student in a closed forum of an elementary school classroom. The court of appeals properly concluded that the Principal did not violate the Student's First Amendment rights when she disallowed him to belatedly add a religious proselytizing message to a product to be sold to elementary school students during classroom time.

The Classroom City exercise was a part of the curriculum and an elementary school setting is a closed forum. The closed forum determination rests not only

on the elementary school setting, but also exists by virtue of the fact that the teacher previewed and approved all of the products to be sold by the students during the Classroom City event. In *Walz v. Egg Harbor Twp. Bd. of Ed.*, 342 F.3d 271 (3d Cir. 2003), an elementary school student brought a First Amendment freedom of speech claim after he was prohibited from distributing candy canes with an attached "religious story, entitled "A Candy Maker's Witness." The story was similar to the card in the instant case in that it described the candy cane as Christian symbolism but the story in *Walz* had more of a historical context. Mrs. Walz checked with the school district in advance of the holiday party and requested that her son, Daniel, be allowed to distribute the candy canes with story attached.[1] Mrs. Walz was "informed that Daniel could distribute the candy canes and the attached story to his classmates, but only before school, or after school, not during the classroom party itself." 342 F.3d at 274. The Walzs then filed suit.

The *Walz* court followed *Hazelwood* emphasizing the need to afford leeway to local school officials. 342 F.3d at 277-278. The court went on to find that a school district may reasonably act to prevent proselytizing speech in a classroom setting. The court recognized a difference between speech as personal expression and speech to promote religion in the school setting:

> Context is essential in evaluating student speech in the elementary school setting.

1. The Currys, on the other hand, gave the School District no advance warning regarding the issue, despite the fact that Mrs. Curry had attended a seminar on the issue and knew that the distribution of the cards would raise an issue.

> It would seem reasonable that student expression may implicate religion if done out of personal observance as opposed to outward promotion. There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view.

Id. at 278-279. The *Walz* court reiterated its concerns regarding speech intended to proselytize in the explicit holding of the case:

> In short, Daniel Walz was not attempting to exercise a right to personal religious observance in response to a class assignment or activity. His mother's stated purpose was to promote a religious message through the channel of a benign classroom activity. In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its education goal and could appear to bear the school's seal of approval.

Id. at 280-281. Those concerns apply here.

The Sixth Circuit has also applied the *Hazelwood* standard in the First Amendment freedom of speech case of *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989). In *Poling*, the court stated that limitations on speech may be proper in the school context even where they would be unconstitutional in a non-school setting. The

court observed that school officials retain control of the public school system including as to speech that would be protected elsewhere. 872 F.2d at 762. The court went on to find that the decision of school officials to prohibit Dean Poling from participation in the school election was justified by the legitimate pedagogical concern of teaching civility. The decision was based on the need to provide "wide latitude" to local school officials. 872 F.2d at 762-763. Applying the *Hazelwood* standard, the court concluded that the decision of school officials to disallow the speech was reasonably related to a legitimate educational concern and, therefore, proper. The *Hazelwood* standard does not compel defendants to show actual, material and substantial disruption of the school environment. Rather, school officials may be found to have acted reasonably when acting to avoid disruption of the educational environment, to avoid offending other students, and to avoid violations of the establishment clause. *Coles v. Cleveland Bd. of Education*, 171 F.3d 369, 377 (6th Cir. 1999).

The Principal sought to prohibit distribution of overtly religious proselytizing material as part of a graded curricular assignment during classroom time so as to avoid disrupting the educational environment, offending other students, or violating the establishment clause. She did not regulate speech due to the viewpoint expressed. Rather, she regulated the speech so as to avoid disruption of the educational environment and to protect the rights of all. The Principal's decision with input from Mr. Norwood, was reasonably tailored, and reasonably related to legitimate pedagogical concerns. The Principal disallowed distribution of religious literature which was proselytizing in nature during

instructional time because she was concerned about offending other students, the actual and potential disruption of the educational environment, and in avoiding a possible violation of the establishment clause. As the Sixth Circuit properly pointed out, "the school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose." Opinion at 15a-16a, citing *Edwards*, 482 U.S. at 584. This evaluation of a legitimate pedagogical concern falls within the Principal's discretion as a school administrator and, as the Sixth Circuit properly concluded, did not violate any right the Student enjoyed under the First Amendment.

E. Contrary to Curry's argument, the *Hazelwood* standard applies to conduct or speech engaged in during classroom instructional time when that conductor speech is engaged in as part of a graded classroom assignment.

This Court has recognized a continuum of speech in or on the premises of a school. Student speech that happens to occur on the school premises is governed by this Court's opinion in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969). This is pure student speech. It must be tolerated by the school "unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood*, *supra*, at 266, quoting *Tinker*, *supra*, at 509.

Under *Tinker*, pure student speech may be prohibited if it materially and substantially interferes with the needs of school discipline, substantially interferes with the work of the school, or impinges upon the rights of other students, 393 U.S. at 509. In *Tinker*, the Court held that a student could wear a black arm band to school to protest the Vietnam War. Central to the holding of *Tinker* was the fact that wearing the arm band would not substantially interfere with the work of the school or impinge on the rights of other students. 393 U.S. at 509. The Court specifically limited the reach of its holding by noting that a school can limit otherwise protected speech if it does so as part of a prescribed classroom exercise:

> Accordingly, we conclude that the standard articulated in Tinker for determining when a school may censor a student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. The opposite of student-sponsored speech is government speech. For example, that occurs when the principal speaks at a school assembly. When the government itself is the speaker, it may make viewpoint-based choices and choose what to say and what not to say, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995).

Between pure student speech and government speech is school-sponsored speech which is governed by *Hazelwood, supra.* School-sponsored speech is student speech that a school affirmatively promotes as opposed to speech that it tolerates. *Hazelwood,* at 270-271. Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school constitute student-sponsored speech over which the school may exercise editorial control so long as its actions in doing so are reasonably related to legitimate pedagogical concerns. *Id.* at 273.

This Court has drawn a distinction between personal expression that happens to occur on school premises and expressive activities that are sponsored by the school and may fairly be characterized as part of the school curriculum. *Hazelwood, supra.* Speech sponsored by the school is subject to greater control by school authorities than speech not so sponsored because educators have a legitimate interest in assuring that participants in the sponsored activity "learn whatever lessons the activity is designed to teach . . ." Id. As long as the actions of the educators are reasonably related to legitimate pedagogical concerns, the *Hazelwood* court held that educators do not offend the First Amendment by exercising editorial control over the style and content of the student's speech in school sponsored expressive activities.

In *Hazelwood,* this Court ruled that a school could control the style and content of student-authored articles published in the student newspaper. The Court first engaged in a forum analysis in order to determine

the level of scrutiny required to evaluate the school's actions. There are three types of forums: traditional public forums, limited public forums, and closed forums.

Traditional public forums include areas, such as streets and parks, which have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Limited public forums are those created by the state when it opens its property for expressive activity. The government may only restrict speech in public forums or limited public forums if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Those state facilities which have not been dedicated to public use but have instead been reserved for other purposes are closed forums. The state may impose reasonable restrictions on speech in closed forums.

Schools are not traditional public forums, *Hazelwood*, *supra*, at 267. However, school officials may create a limited public forum if, by policy or practice, they open the school for indiscriminate use by the public. In *Hazelwood*, the Court held that school officials did not intend to open the school newspaper as a public forum for indiscriminate use by student reporters or editors or by the school body generally. Following *Hazelwood*, other courts have found that classrooms are not public forums if there is no evidence that school authorities have opened them for indiscriminate public expression.

If a student asserts the right to speech in a closed forum, the school authorities may regulate the content of the speech in any reasonable manner, *Hazelwood*,

supra, at 270. In addition to holding that speech in the closed forum of a classroom can be regulated in any reasonable manner, *Hazelwood* recognized that school-sponsored speech that is part of the curriculum may also be reasonably regulated. On that point, the *Hazelwood* Court distinguished the *Tinker* holding as follows:

> The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . .

The contours of a student's activity that are protected by the First Amendment are defined in the school context by *Tinker* and *Hazelwood* and their progeny. Courts have struggled over determining the type of speech involved and the governing test. *Tinker* and *Hazelwood* coexist.

In large part, Ms. Hensinger worried about violating the establishment clause. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated a three-

part test to decide if a government-sponsored activity offends the establishment clause. Thereunder, a government-sponsored activity will not violate the establishment clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of the government with religion. If the challenged practice fails any part of the three-part test, it violates the establishment clause, *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). Whether a particular state action endorses religion depends upon how a reasonable observer would interpret the action, *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995).

This Court has said that, a state interest in avoiding an establishment clause violation may be characterized as compelling and, therefore, may justify content-based discrimination, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). This fact underscores the propriety of the Principal's conduct. Allowing religious proselytizing as part of classroom instructional time in an elementary school raises serious establishment clause concerns. Given the approval process, the fact that the speech would have been engaged in during classroom instructional time, and the context of it in an elementary school, the local school principal had discretion to decide that religious (or anti-religious) messages would not be permitted.

F. A reversal in this case would not change the outcome because Principal Hensinger's conduct was protected with qualified immunity, and the law was not clearly established.

Finally, certiorari should be denied because a reversal in this case will not change the outcome. The Principal is protected with qualified immunity, and even if this Court were to conclude that her decision regarding the candy canes amounted to a violation of the free speech clause of the First Amendment, she would still be cloaked with immunity because the contours of the right were not clearly established. See *Anderson v Creighton*, 483 U.S. 635 (1987).

It is true, to be sure, that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate and that school officials do not possess absolute authority over their students. *Tinker, supra*, at 503-506, and 511. That notion was well honored by the Principal. She acted reasonably and prudently throughout. But if her exercise of discretion regarding the candy cane is deemed to give rise to a constitutional violation, the law on this point was not clearly established. Curry does not cite decisions from this Court or the Sixth Circuit or any other circuit deciding that speech such as this is constitutionally protected in an elementary school as part of a graded classroom project.

As evidence of the difficulty in ascertaining the proper test, there is the discussion in *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995). The issue before that court concerned whether a teacher

violated the free speech rights of one of her ninth grade students by refusing to accept a research paper entitled "The Life of Jesus Christ" and by giving the student a zero for failing to write on another topic. In a concurring opinion, Judge Batchelder offered that, if there were a First Amendment issue, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression allowed under the school curriculum but not sponsored or endorsed by the school.

Further, while Curry argues that a *Tinker* analysis or a limited forum analysis should apply to censorship of student expression within the Classroom City exercise, the United States, in its amicus brief urged that the *Hazelwood* analysis governs. (R.32 Amicus Curiae Brief). Had the Principal undertaken to research the issue herself, the most analogous decision she would have found would have been the case of *DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D. Mich. 1992), *aff' d. sub. nom. DeNooyer v. Merinelli*, Docket No. 92-2080 (6th Cir. 1993). In *DeNooyer*, the plaintiff, an elementary school student, wanted to use a video tape of her singing a proselytizing song about accepting Jesus as her Savior. The *DeNooyer* court began its First Amendment analysis by finding that an elementary classroom is a closed forum in which school authorities may limit speech for reasons related to legitimate educational concerns. In discussing the legitimate concerns of the school district, the *DeNooyer* court said as follows:

> The Supreme Court gave examples of permissible concerns. A school may ensure that the participants learn the lesson that the

> activity is required to teach, that students are not presented with material inappropriate with their level of maturity, and that students' views are not mistakenly attributed to the school.

Id. at 750. The *DeNooyer* court then cited the case of *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1991) and made the following point:

> Further, in *Duran*, the court found that the actions of the school authorities were based upon reasonable pedagogical concerns, i.e., that the religious nature of the speech was inappropriate for the level of maturity students have reached in fifth grade. The court held that it was reasonable for the school not to want to take the substantial risk that the student's views would be erroneously attributed to the school.

799 F. Supp. at 751.

The Student's argument is premised upon the standard articulated by the court in *Tinker*, *supra*. The Principal took the position that the *Hazelwood* standard applies . The Student also attempted to apply a forum analysis "independent of the *Tinker* or *Hazelwood* analysis" (R.34 Brief in Support of Motion Opposing Defendants' Motion for Summary Judgment, Argument IV).

This Court has articulated at least three different tests to be used in considering speech restrictions in the academic arena. By its nature, Classroom City defied

easy categorization as to the type of forum it created. Therefore, a reasonable school administrator could not be expected to identify the subtle distinctions that differentiate one type of forum from another in determining that result with the appropriate standard that should be applied. According to the district court, reasonable persons could view the nature of the Classroom City environment in different ways. (R.50 Memorandum Opinion and Order, pg. 20; Apx. pg. 106).

In response to the Principal's motion for summary judgment based upon qualified immunity, the Student simply made conclusory allegations that the law was clearly established. He failed to point to decisional authority that would have put the Principal on notice that her conduct was unconstitutional.

CONCLUSION

For these reasons, this Court should deny review.

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IN THE
Supreme Court of the United States

JOEL CURRY, a minor, by and through his parents, PAUL and MELANIE CURRY,

Petitioners,

v.

IRENE HENSINGER, Principal, Handley School,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The narrow question before this Court is whether the Sixth Circuit's unprecedented *per se* rule authorizing school officials to censor religious viewpoints from otherwise permissible student speech in school projects, violates the First Amendment. Respondent Hensinger concedes that this "is a novel and important issue of law." Opp. at 12. Indeed it is. This Court should grant review.

The court of appeals grounded its startling rule on two crucial -- and faulty -- premises. First, that student speech that plainly is the student's own expression in a school project is nevertheless subject to the *Hazelwood* standard for speech under school auspices, rather than *Tinker*'s standard for student speech. And second, that legitimate pedagogical interests are served by the elimination of student religious viewpoints from the academic environment. "Here, the principal decided that allowing the card would not be appropriate because it was religious, and therefore could offend other students and their parents," App. 15a (emphasis added). The court severed its evaluation of pedagogical legitimacy not only from the First Amendment norms which protect private religious speech, but even from a review of the academic exercise in which the speech arose. At issue, then, is a blanket rule ratifying censorship of student religious viewpoints in class projects.

Respondent Hensinger defends this invidious suppression of private religious viewpoints by invoking Establishment Clause concerns over government acts. "In large part, Ms. Hensinger was worried about violating the establishment clause."

Opp. at 27. She converts her legal speculations on the Establishment Clause into a pedagogical concern under *Hazelwood*, and believes that schools officials should be accorded "wide latitude" when acting on such concerns, Opp. at 22. She adds that when "serious Establishment Clause concerns" are putatively at stake, a school official has "discretion" to prohibit student speech in a curricular context. Opp. at 28.

By characterizing a school official's ostensible but ill-founded Establishment Clause worry as a pedagogical concern, respondent would transform (with the Sixth Circuit's approval) exaggerated Establishment fears into a *Hazelwood* justification exclusively for censoring student religious viewpoints. But an educator's erroneous legal view merits no judicial deference because of the nominal artifice of designating it as pedagogical.

REPLY TO FACTUAL DISCUSSION

Throughout her brief, Principal Hensinger seeks to portray Joel's speech as if he were some sort of schoolhouse street preacher. For instance, she continuously refers to the tiny booklet attached to Joel's candy canes as an "unsolicited religious proselytizing message," an "unsolicited religious promotional message," etc. *See* Opp. at i, 1, 9, 10, 11, 18, 19, 22, 23, 28. But in reality, Joel's inconspicuous booklet simply detailed his attribution of Christian significance to a familiar ornament (a candy cane) associated with a Christian holiday. It contained no exhortation to believe, and disparaged no other beliefs. If this is proselytizing, then so are

all the daily classroom presentations of Handley School teachers.

Joel's project was no more "unsolicited" than any other product presented in Classroom City -- all of which were equally the result of individual student creativity, not teacher dictation. And if Joel's product was "promotional," equally so were the rest. Indeed, the very point of the exercise was student "promotion" of their wares. Ultimately, the only difference was that Joel's product contained a religiously-oriented perspective. That single difference provides no justification for censorship; indeed, it is a reason for protecting Joel's speech against such censorship.

Principal Hensinger proposes that other students were "essentially a captive audience" to Joel's "unsolicited religious promotional message." Opp. at 18. This is inaccurate. No student was required to approach Joel's storefront (which was only one of 56 in the gymnasium), let alone read the booklet attached to the candy cane ornament. Any student encounter with Joel's speech required the voluntary and active participation of that otherwise unrestrained "shopper," who would have had to take the affirmative step of reading his message (a feat, incidentally, that many of the younger students would have been insufficiently literate to accomplish in the first place).

Principal Hensinger impugns Joel's "belated" attachment of the card to his ornament project. *See, e.g.*, Opp. at i, 1, 9, 15, 19. This a red herring. Supervising teacher Ms. Sweebe confirmed that Joel had done nothing wrong in his attachment of the card. Stip. Facts (Dkt. 15) at ¶20. She confirmed

that he had complied with the rules of the assignment in so doing. *Id.* at ¶19. Most importantly, the timing of the card attachment had nothing to do with Principle Hensinger's censorship of it, which instead was based exclusively on its religious perspective. Hensinger Tr. (Dkt. 16) at 22, 42; Stip. Facts (Dkt. 15) at ¶31.

ARGUMENT IN REPLY

Respondent Principal Hensinger, though acknowledging the novelty and importance of the contested issue, and that it presents a clear "issue of law," Opp. at 10, nevertheless presents an amalgam of reasons why this Court should deny review in this case. None are meritorious.

I. THIS CASE CALLS FOR IMMEDIATE REVIEW.

Respondent Hensinger begins by proposing that the legal issue presented for review should "percolate" in the lower courts, rather than be resolved now. She offers no adequate reason for this suggestion. The need for swift repair of the Sixth Circuit's grave error outbalances any benefit that theoretically might obtain from other lower courts explaining why they would either repeat or repudiate that error.

Principal Hensinger next incomprehensibly argues that the subject of Joel Curry's certiorari petition was not argued below and was not directly ruled on below. Opp. at 11, 14-15. But Joel certainly has argued throughout this litigation that the Constitution forbids the targeted religious discrimination effectuated by Principal Hensinger's

censorship.[1] And the Sixth Circuit plainly rejected that argument, App. 14a-16a. The certiorari petition's focused critique of a *per se* ratification of religious discrimination is in response to the Sixth Circuit's alarming decision newly announcing such a rule.

II. THE SIXTH CIRCUIT DEVIATED FROM FIRST AMENDMENT STANDARDS.

Respondent Hensinger argues that the court of appeals decision was correctly decided. This begs the questions presented in the petition for review. In any event, the decision below was unmistakably not correctly decided. Never has this Court upheld a school's suppression of private speech solely because it contains religious content or viewpoint. *See, e.g.*, *Good News Club v. Milford*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). Nor has this Court ever held that genuinely student-initiated speech, in a context where the speaker is clearly the student, not the school or some school organ (like a newspaper, or play), is subject to *Hazelwood* rather than *Tinker*. *See infra*, § IV.

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[1] Principal Hensinger herself elsewhere recites that Joel made such arguments. Opp. at 5. To be sure, every brief he filed in the district court and court of appeals presents this argument as its principle theme. Principal Hensinger's curious mistake here seems to derive from her failure to identify that religious viewpoint discrimination is a species of offense under this Court's Speech Clause jurisprudence, not merely equal protection jurisprudence. *See* Opp. at 14.

III. THE RELIGIOUS PERSPECTIVE OF ASSIGNMENT-COMPLIANT STUDENT SPEECH IS NOT A BASIS FOR ITS PROHIBITION.

It is axiomatic that religious speech as a category is protected by the First Amendment. *Widmar*, 454 U.S. at 269; *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). It is thus *prima facie* implausible to justify censorship of student speech, as does Principal Hensinger, on the mere fact that it is religious. *Cf. Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) ("Lacking any legitimate reason for excluding the . . . speech from its forum—'because it's religious' will not do").

Principle Hensinger's additional contention that Joel's speech had to be suppressed in order to avoid an Establishment Clause violation is fanciful. Joel was one of over a hundred fifth-graders participating in a class assignment. His private speech in his individual academic effort does not constitute a government establishment of religion.

The familiar refrain from State officials that private parties' speech violates the Establishment Clause has been rejected by this Court every time it has confronted it. *Good News Club*, 533 U.S. at 113-20; *Rosenberger*, 515 U.S. at 839-46; *Capitol Square*, 515 U.S. 753; *Lamb's Chapel v. Center Moriches Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993); *Widmar*, 454 U.S. 263, 271-75. And that misbegotten legal notion cannot be rehabilitated by classifying it as a pedagogical concern under *Hazelwood* requiring judicial deference when it is employed to censor students.

IV. THE RULE IN *HAZELWOOD* IS NOT PROPERLY APPLIED TO INDIVIDUAL STUDENT RESPONSES TO CLASS ASSIGNMENTS.

Principal Hensinger does not really engage analytically with Petitioner's challenge to the application of *Hazelwood* to this case. The logic of the case law indeed points to *Tinker* -- not *Hazelwood* -- as the standard governing the outcome of this case. This Court's emphasis in *Hazelwood*, which it reiterated in *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2627 (2007), is that application of its rule is contingent on a reasonable perception that the student speech at issue carries the imprimatur of the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Classroom City, by contrast, closely approximates a public forum, in which over a hundred fifth-graders were given occasion to express their individual creativity in response to a class assignment. It is not reasonable to ascribe a school imprimatur to the efforts of each participating student. Individual student class projects like this one are not analogous to the school-published newspaper or school-produced play that this Court in *Hazelwood* identified as paradigmatic instances of speech covered under the *Hazelwood* rule. *Id.* at 271-73.[2]

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[2] Principal Hensinger asserts that the United States in its amicus brief filed in the district court "urged that the *Hazelwood* analysis governs." Opp. at 30. This is incorrect. The Justice Department did not take a side on the question of which case rule should apply. Instead, it stated that this question "need not be reached" because even under *Hazelwood*

V. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DEPARTMENT OF EDUCATION GUIDELINES ON STUDENT RELIGIOUS SPEECH.

Principal Hensinger manifestly misreads the nationally-binding Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003), in order to claim that the Sixth Circuit's decision does not conflict with it. If the DOE *Guidance* standards were to authorize the censorship of student curricular speech simply because it is religious, as Respondent implausibly asserts, it would defeat the whole point of the promulgation of those standards, the obvious purpose of which is to communicate the opposite message.

Principal Hensinger does acknowledge (indeed quotes from) the *Guidance* standards that approve student religious expression in class assignments and that instruct that legitimate pedagogical interests do not authorize hostility to religious speech. Opp. at 17-18. However, she posits that these standards protect student religious speech only insofar as other students are unaware of the existence of that speech; when other students might be exposed to that speech, it is then properly targeted for its religious viewpoint. Opp. at 18. This is absurd. The DOE's *Guidance* never qualifies its rule to apply only to "confidential" student religious speech. Indeed, the *Guidance* excerpt on curricular speech quoted by Principal Hensinger herself

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Joel should prevail. Br. Amicus Curiae of United States (Dkt. 32) at 6.

explicitly validates student religious speech in "artwork" and "oral assignments" -- both of which will reach other students. Opp. at 17, quoting *Guidance*, 68 Fed. Reg. at 9647.[3] The Sixth Circuit's opinion is flatly in conflict with the DOE standards on student religious speech.

VI. PRINCIPAL HENSINGER'S QUALIFIED IMMUNITY ARGUMENT IS MISDIRECTED, AND WITHOUT MERIT.

The precedent-setting error of the Sixth Circuit -- the only question now before this Court -- presents pure questions of law that, if left unresolved, will spawn mischief in subsequent decisions. Yet Principle Hensinger suggests that review should be denied in this case because she merits qualified immunity -- an argument the Sixth Circuit did not fully explore.[4] The existence of a potential alternative basis for a judgment for a respondent, however, is not a ground to decline review when the court below has squarely ruled on an issue of law that merits independent

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[3] *Cf. Walz v. Egg Harbor Township Bd. of Education*, 342 F.3d 271, 278-79 (3d Cir. 2003):

> For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; . . . the student speaker is expressing himself in the context of a school assignment. . . . Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected.

[4] Under *Saucier v. Katz*, 533 U.S. 194 (2001), a decision on the merits is technically a part of the qualified immunity analysis. The court below did not go beyond that step.

consideration by this Court. If this Court reverses the Sixth Circuit's erroneous decision on the merits, then on remand respondent is free to urge resolution of the outstanding qualified immunity question. At this point, however, there is no decision in the Sixth Circuit to review on that defense.[5]

And it is by no means a foregone conclusion that Principal Hensinger would be entitled to qualified immunity. The question on which the qualified immunity issue turns in this case is whether a student whose speech was presented in response to a class assignment, in a way that complies entirely with the terms and the pedagogical goals of the assignment, and is not disruptive of the educational environment, has a right to speak from a religious perspective in that assignment without being censored because of his religious viewpoint. The affirmative answer to that question is clearly established.

Principal Hensinger additionally argues for qualified immunity by echoing the district court's contention that because speech presented in the context of Classroom City may be susceptible to evaluation under several legal standards, with no certainty as to which standard governs, a grant of qualified immunity is appropriate. Opp. at 31-32. But also like the district court, Defendant Hensinger makes no effort to demonstrate how any of the ostensible legal standards would justify the censorship of non-disruptive, assignment-compliant student speech for the sole reason that the speech is presented from a religious viewpoint. The alleged

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[5] See preceding footnote.

confusing menu of legal tests thus provides no basis upon which to immunize what would be a constitutional violation under any of the standards.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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